Supreme Court, U.S.
FILED
07-357 SEP 14 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

AROOSTOOK BAND OF MICMACS, PETITIONER

v.

PATRICIA E. RYAN, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; WARREN C. KESSLER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; PAUL K. VESTAL, JR., IN HIS OFFICIAL CAPACITY AS MEMBER OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; JAMES VARNER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; JADINE R. O'BRIEN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; KRISTEN L. AIELLO, IN HER OFFICIAL CAPACITY AS MEMBER OF THE HUMAN RIGHTS COMMISSION OF THE STATE OF MAINE; LISA GARDINER; TAMMY CONDON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK

7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

DOUGLAS J. LUCKERMAN
Counsel of Record

20 Outlook Drive
Lexington, MA 02421
781-861-6535

Attorneys for Petitioners

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

QUESTIONS PRESENTED

1. Does denying the Aroostook Band of Micmacs the inherent sovereign right to govern their internal tribal affairs because of language in the 1980 Maine Indian Claims Settlement Act, a statute which Congress did not intend to apply to the Band, ignore federal common law establishing their sovereign rights, disregard this Court's decisions to the same effect and usurp the very tribal rights which Congress acknowledged when it passed the Federal Micmac Act in1991?

2. Where Congress has not expressly provided otherwise and following the logic of this Court's decision in *Montana v. United States*, 450 U.S. 544(1981), is the Micmac tribal government instead of a State administrative agency the proper forum to determine a workplace discrimination claim against the tribe by its nonmember employees arising from their consensual employment on tribal lands?

3. Is the ruling below at odds with those courts of appeals which recognize that a federally recognized tribe like the Micmacs retains the inherent tribal right of self government and the right to decide workplace discrimination claims by nonmember employees arising from their consensual employment on tribal lands?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 14

CONCLUSION 25

APPENDIX

Circuit Court Opinion 1a

District Court Decision 70a

Order Denying Rehearing 116a

Relevant Provisions Involved 118a

TABLE OF AUTHORITIES

Page

CASES

ALASKA PACIFIC FISHERIES v. UNITED STATES, 248 U.S. 78, 89(1918) 19

CALIFORNIA v. CABAZON BAND OF MISSION INDIANS, 480 U.S. 202, 207(1987) 17, 19, 20, 21

CHOCTAW NATION v. OKLAHOMA, 397 U.S. 620, 631(1970) 19

COUNTY OF YAKIMA v. CONFEDERATED TRIBES AND BANDS OF YAKIMA NATION, 502 U.S. 251, 269(1992) 19

FOND DU LAC HEAVY EQUIP. & CONSTR. CO., INC., 986 F.2D 246, 249(8TH 15, 24

GALLEGOS v. JICARRELLA APACHE NATION, 97 FED. APPX. 806, 811(10TH 15

JOINT TRIBAL COUNCIL OF PASSAMAQUODDY TRIBE v. MORTON, 528 F.2D 370, 379-380(1ST 3

MCCLANAHAN v. ARIZONA STATE TAX COMM'N, 411 U.S. 164, 172-173 (1973) 17, 18, 19

MESCALERO APACHE TRIBE v. JONES, 411 U.S. 145, 161-162(1973) 19

MONTANA v. BLACKFEET TRIBE, 471 U.S. 759, 766(1985) 19

MONTANA v. UNITED STATES, 450 U.S. 544, 564-567(1981) 22, 23

MORTON V. MANCARI, 417 U.S. 535, 551-555 (1974) 14

MOUNTAIN APACHE TRIBE V. BRACKER, 448 U.S. 136, 143(1980) 18, 19, 21, 23

NATIONAL FARMERS UNION INS. COS. V. CROW TRIBE, 471 U.S. 845, 851 (1985) 16, 17

NEW MEXICO V. MESCALERO APACHE TRIBE, 462 U.S. 324, 332-334(1983)(..... 17, 18, 19, 21

OKLAHOMA TAX COMM'N V. POTAWATOMI TRIBE, 498 U.S. 505, 510-511(1991) 19

ONEIDA V. ONEIDA INDIAN NATION, 470 U.S. 226, 247-248 (1985) 19

PENOBSCOT NATION V. FELLENCER, 164 F.3D 706, 709-713(1ST 15

SANTA CLARA PUEBLO V. MARTINEZ, 436 U.S. 49, 64-67(1978) 14, 17, 18

SNYDER V. NAVAHO NATION, 382 F.3D 892, 895-896 (9TH CIR. 2004) 15, 24

STATE OF R.I. V. NARRAGANSETT INDIAN TRIBE, 19 F.3D 685, 694 16

STATE V. NEWELL, 24 A. 943, 944(ME.1892) 3, 6

STRATE V. A-1 CONTRACTORS, 520 U.S. 438, 446(1997) 23

TAYLOR V. ALABAMA INTERTRIBAL COUNCIL TITLE IV, 261 F.3D 1032, 1035-1036(11TH 15

UNITED STATES V. DION, 476 U.S. 734, 738-739(1986) 19

UNITED STATES v. KAGAMA, 118 U.S. 375, 381 (1886) 17

UNITED STATES v. LARA, 541 U.S. 193 18

UNITED STATES v. WHEELER, 435 U.S. 313, 322-323(1978) 17, 18

WILLIAMS v. LEE, 358 U.S. 217, 223(1959) 23, 24

STATUTES

25 U.S.C. § 1721 ..... 8, 11

25 U.S.C. §§ 1721-1735 5

25 U.S.C. §1721(a)(9) 3

25 U.S.C. §§ 1721(b)(3)-(4) 5

25 U.S.C. § 1725(a) 6

25 U.S.C. § 1726(a) 6

25 U.S.C. § 1735 6

28 U.S.C. §1331 ..... 9, 10

42 U.S.C. §§ 2000e-(b) 15

5 MRSA §§ 4551-4634 9

26 MRSA §§ 831-840 9

30 MRSA §§ 6201-6214 3

30 MRSA § 6204 4

30 MRSA § 6206.1 4

30 MRSA §§ 6209 6

30 MRSA §§ 7201-7207 7

30 MRSA §§ 7203 8

H.R. No. 96-1353 7

OPINIONS BELOW

The published decision of the United States Court of Appeals for the First Circuit in the case of *Aroostook Band of Micmacs v. Patricia E. Ryan et al.*, Docket Nos. 06-1127 & 06-1358, reported at 484 F.3rd 41, 2007 U.S. App. LEXIS 8710, and filed April 17, 2007, reversing a decision by the U.S. Magistrate which enjoined the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employees, is set forth in the Appendix hereto(App.1-69).

The published decision of the U.S. Magistrate for the District Court of Maine in the case of *Aroostook Band of Micmacs v. Ryan et al.*, C.A. 03-24-B-K, reported at 402 F. Supp.2d 114, 2005 U.S. Dist. LEXIS 31173, and filed on December 5, 2005, enjoining the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employees, is set forth in the Appendix hereto(App.70-115).

The unpublished decision of the United States Court of Appeals for the First Circuit in *Aroostook Band of Micmacs v. Patricia E. Ryan et al.*, Docket Nos. 06-1127 & 06-1358, dated May 21, 2007, denying the Micmacs' petition for rehearing or for rehearing *en banc* is set forth in the Appendix hereto(App.116-117).

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit reversing a decision by the U.S. Magistrate which enjoined the Maine Human Rights

Commission from acting on discrimination complaints brought against the tribe by its former employees, was entered on April 17, 2007; on or about June 20, 2007, the petitioner timely applied to Justice Souter of this Court for an extension of time to file its petition for certiorari(Docket No. 06A1166). On July 12, 2007, Justice Souter of this Court granted the petitioner's motion, extending the time to file this petition for certiorari until October 18, 2007.

This petition for writ of certiorari is filed within the time limits prescribed by Justice Souter's order in Docket No. 06A1166, allowing the petitioner's application for an extension of time to file this petition.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS (see appendix)

STATEMENT

Until 1819, Maine was a district of Massachusetts and as a result of agreements between the Commonwealth of Massachusetts and the Maine Indian tribes as well as the outright appropriation of tribal lands by settlers, much of the aboriginal land of these Maine tribes was lost. Since 1820, the State of Maine provided various services to the tribes living within its borders, including the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of the Maliseet Indians and the petitioner Aroostook Band of Micmacs ("the petitioner," "the Micmacs" or "the Band"). The federal government, however, refused to provide any services, denying that it

had any jurisdiction over these tribes. See 25 U.S.C. §1721(a)(9). Until the 1970's, the State of Maine and its courts considered the Indian tribes located there to be "as completely subject to...state [law] as any other inhabitants can be." *State v. Newell*, 24 A. 943, 944(Me.1892).

In the early1970's, however, the Passamaquoddy Tribe filed suit in federal court claiming much of the land in Maine, arguing that its earlier agreements with Massachusetts ceding its territory were invalid because they were never approved by Congress. After it was found that the federal government was obligated to represent the tribe in its land claim against Maine in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-380(1st Cir. 1975), and after the federal authorities interceded, the Passamaquoddy Tribe and the Penobscot Nation in 1979 entered into settlement negotiations with Maine in order to resolve their land claims. The State refused to acknowledge or bargain with the "so-called tribe" of the Houlton Band of the Maliseet Indians.

The result of negotiations between the State and these two tribes was the Maine Indian Claims Settlement Act, 30 MRSA §§ 6201-6214, enacted in 1980("the State Implementing Act"). Under the Act, the two tribes withdrew their land claims in return for a cash payment, the State's grant of certain land in trust reserved for their benefit, their eligibility for State financial assistance and an acknowledgment by the State that while subject to State law, these two tribes could still exercise the right of tribal self government, i.e., the power to decide in their own tribal fora the rights and duties of tribe members

arising from conduct on tribal lands.

As to the State's recognition of the right to tribal self-government, 30 MRSA § 6206.1 provides that:

> ...internal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Even though the State refused to acknowledge or even bargain with the Maliseet over the terms of the settlement or the language of the State Implementing Act , it nonetheless unilaterally included the Maliseet within the Act's terms. Thus it was provided that while "the Passamaquoddy Tribe and the Penobscot Nation...agreed to adopt the laws of the State as their own to the extent provided in this Act[,] the Houlton Band of Maliseet Indians and its lands *will be wholly subject to the laws of the State of Maine.*" *Id.* at § 6202(emphasis supplied).

In addition, 30 MRSA § 6204 provides that

> [e]xcept as otherwise provided in this Act, *all* Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the

> same extent as any other person or lands or other natural resources therein.(emphasis supplied).

After negotiations over the terms of this settlement ended, the Maliseet entered into an agreement with the Passamaquoddy and the Penobscot to be included within the anticipated federal legislation ratifying the State Implementing Act, necessary legislation since Congress has the plenary power to limit the sovereign rights of Indians, Indian tribes or Indian bands.

Soon after the State Implementing Act became law in 1980, Congress enacted in the same year the Maine Indian Claims Settlement Act , 25 U.S.C. §§ 1721-1735("the 1980 Federal Act"). One of its purposes was to ratify the state Act and to "confirm that all other Indians, Indian nations and tribes and bands of Indians [besides the Passamaquoddy Tribe and the Penobscot Nation] now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein." 25 U.S.C. §§ 1721(b)(3)-(4);1725(b)(1).

Moreover, the 1980 Federal Act made clear that all Indians, Indian tribes and bands of Indians other than the members of the Passamaquoddy Tribe or the Penobscot Nation

> shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C. § 1725(a). The tribal courts of the Passamaquoddy Tribe and the Penobscot Nation were given the same jurisdiction to hear civil and criminal matters involving tribal members as given them by the State Implementing Act. 25 U.S.C. § 1725(b)(1). See 30 MRSA §§ 6209-A;6209-B.

There were no provisions in the 1980 Federal Act addressing the jurisdiction of the Maliseet Indians to hear and decide civil or criminal matters involving tribal members. However, the 1980 Federal Act explicitly recognizes the Houlton Band of Maliseet Indians as a sovereign political entity entitled to all of the rights appurtenant thereto and acknowledged that, contrary to prior law when these three Indian groups were "as completely subject to...state [law] as any other inhabitants can be," *State v. Newell*, 24 A. at 944, they now have the right to govern and decide their internal tribal matters by resort to their own tribal fora:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument...must be consistent with the terms of this subchapter and any amendments thereto....

25 U.S.C. § 1726(a). Finally, if there was a conflict between the 1980 Federal Act and the State Implementing Act, the 1980 Federal Act governs. 25 U.S.C. § 1735.

The legislative history of the 1980 Federal Act shows that the Act is a compromise "in which state authority is extended over Indian territory to the extent provided in the [State] Implementing Act[;] the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs...[and] that rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs,... the settlement strengthens the sovereignty of the Maine tribes." S. Rep. No. 96-957 at 14; H.R. No. 96-1353 at 14-15, reproduced at 1980 U.S. Cong. & Adm. News at 3790.

The petitioner Aroostook Band of Micmacs, a group of Indians which has called northern Maine their home since at least the early 1600's, did not participate in these negotiations with the State in 1979 and 1980. Its members, although then not federally recognized as a Band, believed that they would be included within the settlement but were not. They eventually asserted their own land claims against the State of Maine in the 1980's and as a result of negotiations between the Band and the State, Maine enacted in 1989 the Micmac Settlement Act, 30 MRSA §§ 7201-7207("the State Micmac Act").

The State Micmac Act provided that it would become law only if the Tribal Council of the Band certified its agreement within 60 days of the legislature's adjournment and if analogous federal legislation ratifying the Act without modification was forthcoming from Congress. The Act provided that the Micmacs, like the Maliseet, would be subject to "the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person...," and that

they could "not...exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers." 30 MRSA §§ 7203;7205. The Tribal Council of the Micmacs, however, never certified its agreement with its provisions and the State Micmac Act *never* became law in the State of Maine.

Nevertheless, on November 21, 1991, Congress enacted the Aroostook Band of Micmacs Settlement Act ("the Federal Micmac Act"), set out as a note under 25 U.S.C. § 1721. Its provisions explained that the Micmacs had not been included in the earlier Federal Act due to lack of documentation, an omission now corrected; and that they now should be afforded the same settlement as the one provided the Maliseet in the earlier 1980 Federal Act. *Id.* at §2(a)(4);(5). On this basis, Congress formally recognized the Band as a federally protected Indian tribe and ratified the [State] Micmac Act. *Id.*

Section 7(a) of the Federal Micmac Act further provides for the Micmacs' self-government and despite its aspiration to treat the Micmacs like the Maliseet, the Act contains *no* provision subjecting the Micmacs to State law. Instead, § 6(b) of the Federal Micmac Act, entitled "Laws Applicable," subjects the Band only to *federal* law on the same terms as the other Maine tribes. Finally, § 11 of the Act makes its provisions govern any conflict between its terms and those in the State Implementing Act, the 1980 Federal Act or the State Micmac Act.

With this statutory law as background, the Micmacs in 2001 and 2002 fired three of their employees, the respondents Lisa Gardiner, Tammy Condon and

Beverly Ayoob, all working for the tribal government(App.9-10). After unsuccessfully seeking relief from the Band's Tribal Council, Gardiner and Condon filed charges with the State's Human Rights Commission alleging unlawful employment discrimination by the Band in violation of the Maine Human Rights Act(MHRA), 5 MRSA §§ 4551-4634; and that they had been unlawfully retaliated against in violation of MHRA as well as the Maine Whistleblowers' Protection Act(MWPA), 26 MRSA §§ 831-840 (App.10). Ayoob brought directly to the Commission her allegations against the Band of sexual harassment and retaliation(*Id.*).

In all three cases, the State Commission filed charges with the U.S. Equal Employment Opportunity Commission(*Id.*).The Micmacs asked the State Commission to dismiss the complaints arguing that it had no jurisdiction over the Band on these internal tribal matters(*Id.*). When the Commission continued its investigation, the Band filed suit in federal district court for the District of Maine positing jurisdiction under 28 U.S.C. §1331, and seeking to enjoin the Commission's investigation(*Id.*). The Band claimed that its inherent tribal sovereignty and its sovereign immunity prohibited the Commission from enforcing the MHRA or MWPA against it(App. 10-11).

Upon cross motions for summary judgment, the magistrate judge in the district court agreed with the Band that the Federal Micmac Act and the Band's inherent sovereignty protects the Band's employment decisions from scrutiny under Maine law(App. 79-81). The magistrate ruled that the Tribal Council of the Micmacs

never certified its agreement with the State Micmac Act, as required for it to become effective, and that the State Micmac Act *never* became State law(App. 79-81).

Without the State Micmac Act having become law, the magistrate judge ruled that while the State Implementing Act had in general terms subjected the Micmacs like all other Indians in the state to Maine law, this provision was effectively abrogated by three provisions of the Federal Micmac Act, i.e.,(1) the grant of federal recognition to the Band; (2) the authorization for the Band to organize its own government; and (3)the absence of any language subjecting the Band to suit in Maine(App. 85-89). As she concluded, all these provisions conflict with the State Implementing Act and the Federal Micmac Act provides that its own provisions will control such a conflict(App. 85-90). Thus, on its face, the Federal Micmac Act provides that the Micmacs will not be subject to the laws of the State of Maine(*Id.*).

Applying federal common law, the magistrate judge ruled that the Micmacs' unlimited right of self-government under the Federal Micmac Act carries with it the right to make their own employment decisions free of discrimination claims by the Commission(App. 90-96). Following the reasoning of several courts of appeals, she concluded:

> ...[T]he right to discharge employees is a right implicating a tribe's right to self-govern and...federal employment related claims cannot be maintained against (self-governing) tribes even when there is not express statutory exemption on par with Title VII....I can identify no reason why

> the same would not hold true for state employment discrimination claims when a tribe has a common law or equivalent statutory right to self government.

(App. 95). She accordingly entered judgment in favor of the Micmacs and permanently enjoined the Commission from applying MHRA, MWPA or Title VII against them because "under 25 U.S.C. § 1721 note 7(a), the Band enjoys a statutory right of self-governance that prohibits the enforcement of state (or federal) employment discrimination laws against the Band"(App. 103-104).

Upon the respondents' appeal, a majority of the court of appeals reversed the magistrate judge's decision(App. 1-69). Without deciding whether the State Micmac Act had ever become law and conceding that the 1991 Federal Micmac Act contains *no* provision subjecting the Micmacs to State law, the majority nevertheless concluded that the 1980 Federal Act together with the Federal Micmac Act "displaced any federal common law that might otherwise bear on this dispute"(App. 13-14).

As the majority saw it, § 1725(a) of the 1980 Federal Act makes clear that *all* Indian groups except members of the Passamaquoddy Tribe or the Penobscot Nation are subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State of Maine to the same extent as any other person; and the Federal Micmac Act does not conflict with but rather reinforces the 1980 Federal Act on this point(App. 13-14). The majority thought that this "was enough" to justify the conclusion

that State law including the MHRA and the MWPA applies to the Band's employment decisions(App. 23).

The majority rejected the Micmacs' argument that the 1980 Federal Act was not explicit enough to have State law override the Band's inherent authority to make its own decisions about its employees(App. 14- 23). The majority read the State Implementing Act as making the "internal tribal matters" of *only the Passamaquoddy Tribe and the Penobscot Nation* immune from state regulation, reinforcing its conclusion that under § 1725(a) of the 1980 Federal Act, the Band's decision to terminate its employees was not an "internal tribal matter" insulated from State law(App. 23-24).

The majority also rejected the Micmacs' further contention that under federal common law, the internal tribal matters of *all* Indian groups are insulated from state law because of their inherent tribal sovereignty unless explicitly qualified by Congress, and thus it was unnecessary for the 1980 Federal Act to state this principle explicitly in order for the Micmacs to have their internal tribal matters remain protected from regulation by the State(App. 23-25).The majority also refused to agree with the Micmacs that §§ 6(a) and 7(a) together with § 11 of the Federal Micmac Act codifies the tribe's inherent sovereignty as already recognized by federal common law or that those provisions impliedly repeal those provisions of the 1980 Federal Act to the contrary(App. 26-33).

Circuit Judge Lipez dissented from the majority opinion and would have affirmed the decision for the reasons identified in the magistrate judge's opinion(App.

40-69). The dissent concluded that the Federal Act

> no longer governs the relationship between the Band and the State. Instead, the [Federal Micmac Act] replaced [the 1980 Federal Act] in 1991 as the federal law governing the Band's status, including its relationship with the State of Maine....[The State Micmac Act] was never validly enacted, and the jurisdiction asserted by Maine and anticipated by Congress never took effect. Consequently, I conclude that the Band is not subject to the Maine employment discrimination laws at issue in this case.

(App. 41-42).

That the State Micmac Act never became law and therefore could not define the Band's relationship with the State was no reason for Judge Lipez to resurrect the "default provisions" of § 1725(a) pf the1980 Federal Act, as the majority did, in order to subject the Band to some level of state jurisdiction (App. 53). As he concluded,

> courts may not ignore established principles of statutory construction or the canons of Indian law to avoid uncomfortable outcomes. The failure of the [State Micmac Act] to take effect means that the Micmacs were were left with the sovereign rights they otherwise would hold as a recognized Indian tribe under [the Federal Micmac Act]....Although that outcome is not what Congress anticipated, it is nonetheless the inevitable result of the choice Congress made to explicitly rely on the [S]tate Micmac Act to frame

the Maine-Micmac relationship.

(App. 53-54).

On May 21, 2007, the court of appeals denied the petitioner's timely filed petition for panel rehearing or for rehearing *en banc*(App. 116-117). On July 12, 2007, Justice Souter granted the petitioner's motion to extend the time to file this petition until October 18, 2007.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Usurps Congress's Intent To Preserve The Micmacs' Inherent Tribal Rights, Undermines The Decisions Of This Court Requiring Positive Statutory Language To Diminish The Tribe's Inherent Sovereignty And Nullifies The Sovereign Rights Congress Acknowledged In The Tribe To Govern Its Internal Affairs.

In *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974), this Court held that an Indian tribe's strong interest in self-governance will prevent parties from asserting employment discrimination claims because of Indian preferences for jobs in the Bureau of Indian Affairs. *Id.* In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-67(1978), the Court held that in order to protect tribal self-government, Indian tribunals are the exclusive forum to determine discrimination claims under the Indian Civil Rights Act of 1968. Moreover, in furtherance of the inherent sovereign rights of Indian tribes, Congress has expressly exempted Indian tribes from the definition of "employer" under Title VII of the Civil Rights Act of

1964, nullifying state or federal regulation of workplace discrimination claims against tribes based upon race. See 42 U.S.C. §§ 2000e-(b) & e-(b)(2)(I).

These legal understandings have led most, if not all, courts of appeals to formulate a so-called Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-governance or its administration is an "intramural" matter exempt from federal or state regulation. *Snyder v. Navaho Nation*, 382 F.3d 892, 895-896 (9th Cir. 2004)(tribal law enforcement officer). *Gallegos v. Jicarrella Apache Nation*, 97 Fed. Appx. 806, 811(10th Cir. 2003)(same). *Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1035-1036(11th Cir. 2001)(non-Indian employee). *Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249(8th Cir. 1993)(same). Any other result would undermine a tribe's strong interest in self-governance.

The court of appeals for the First Circuit adopted this employment rule in *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709-713(1st Cir. 1999), holding that the tribe there was not subject to a workplace discrimination claim under Maine law after discharging a non-Indian employee from the position of nurse in the tribe-run health center. *Id.* In reaching this result, the court reviewed the inherent sovereign rights retained by the tribe since the beginning of the republic, the nature and extent of Congress' statutory inroads into these retained tribal sovereign rights, and the special rules of statutory construction which attend a reading of the 1980 Federal Act authored by Congress. *Id.* See also *State of R.I. v.*

Narragansett Indian Tribe, 19 F.3d 685, 694;701(1st Cir. 1994).

All three discharged employees here worked for the tribe's government, implicating the Band's strong interest in self-government, an interest explicitly furthered by Congress' recognition of the Band in the 1991 Federal Micmac Act as a sovereign political entity with a government-to-government relationship with the Federal government. Despite this, the majority abandoned its holding in *Fellencer*, rejecting any notion that the Micmacs have retained the inherent tribal rights to self government or to make its own employment decisions. It disregarded the Court's canons of statutory construction in reading the 1980 Federal Act or the 1991 Federal Micmac Act, canons which favor a recognition of the Band's inherent tribal rights, and concluded contrary to the federal common law developed by this Court that the1980 Federal Act, a statute which Congress did not intend to apply to the Micmacs, results in the *complete destruction of all the Band's inherent sovereign rights, including the right to make employment decisions free of federal or State regulation*. This ruling is at odds with the decisions of this Court on every score.

A. The Lower Court Wrongly Extinguished The Tribe's Inherent Sovereign Rights.

This Court has repeatedly made clear that Indian tribes occupy a unique status under our law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). The various tribes "were once independent and sovereign nations," self-governing political communities which existed long before the coming of the Europeans or

the formation of our Government. *United States v. Wheeler*, 435 U.S. 313, 322-323(1978). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-173 (1973). At one time, they exercised unlimited power over their members as well as those who were permitted to join their communities. *National Farmers Union Ins. Cos. v. Crow Tribe, supra.*

After Congress acted to protect the territorial and political rights of Indian tribes, this Court found that they no longer possessed the full attributes of sovereignty which they had previously exercised. *Wheeler*, 435 U.S. at 323 quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886).

However, this Court has consistently held that Indian tribes have not given up *all* their sovereign rights. Regardless of their incorporation as a society into the Nation, Indian tribes remain a "separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55(1978) quoting *Kagama*, 118 U.S. at 381-382. *Wheeler, supra.*

Until Congress provides otherwise, the tribes retain their right to self government, self sufficiency and economic development; and they possess the power to make their own substantive law concerning internal tribal matters, the very core of self government. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207(1987) ("retain[ed]... sovereignty"). *National Farmers Union Ins. Cos. v. Crow Tribe, supra*("retained...inherent powers"). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-334(1983)("sovereignty retained by tribes").*White Mountain Apache Tribe v. Bracker*, 448

U.S. 136, 143(1980). *Wheeler*, 435 U.S. at 322-325("inherent powers of a limited sovereignty"). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 172 n.8("residual Indian sovereignty"). Contrast *United States v. Lara*, 541 U.S. 193, 214-223(2004)(Thomas, J., concurring) (questioning the constitutional basis for co-existing, competing sovereign powers).

The majority below relied upon the1980 Federal Act to justify applying State law to the Band's discharge of its employees. But the only inherent right which Congress addressed in the 1980 Federal Act was the Band's sovereign immunity, restored to Band by the 1991 Federal Micmac Act. *Neither the 1980 Federal Act nor the 1991 Federal Micmac Act extinguish the Band's inherent tribal right of self-government.* In fact, in § 6(a) of the1991 Federal Micmac Act, Congress expressly recognized the Band as a sovereign political entity with all the rights appurtenant thereto. Section 7(a) of the Act expressly recognizes the Micmacs' right to organize and govern itself. This recognition by Congress of the Band's inherent tribal right of self-government is the "crucial 'backdrop'" against which any assertion of state authority over the Band must be assessed. *Mescalero*, 462 U.S. at 334. *Bracker, supra. Santa Clara Pueblo*, 436 U.S. at 60. *McClanahan, supra.* Yet the majority ignored this compelling precedent and applied an outdated general statute instead of a specific statute addressing the Micmacs' sovereign rights, destroying in the process the Band's inherent tribal rights to self government and to make its own employment decisions.

B. *The Lower Court Refused To Apply the Canons of Construction In Interpreting the 1980 Federal Act Or the 1991 Federal Micmac Act.*

Normal rules of construction do not apply when statutes involving Indians are in issue. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766(1985). *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 161-162(1973). Rooted in the unique trust relationship between the Federal Government and the Indians, the canons of construction provide that statutes addressing the extent of Indian rights are to be interpreted liberally in favor of the Indians with any ambiguities construed for their benefit, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269(1992). *McClanahan*, 411 U.S. at 174. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631(1970). *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89(1918).

Furthermore, Congress' intent to extinguish inherent Indian tribal rights, especially those of self-government, must be explicit, plain and unambiguous and will not be lightly implied from the statutory provisions. *United States v. Dion*, 476 U.S. 734, 738-739(1986).*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985). This is because Congress has consistently encouraged Indian self-government including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 510-511(1991). *California v. Cabazon Band of Mission Indians*, 480 U.S. at 216-217 quoting *Mescalero*, 462 U.S. at 334-335 and citing *Bracker*, 448 U.S. at 143. "These are important federal

interests," *Cabazon*, 480 U.S. at 217, which the court of appeals was bound to accommodate in its construction of the 1980 Federal Act and the 1991 Micmac Act.

The lower court failed to do so. If it had properly applied this Court's canons of construction, it would have concluded that even if the 1980 Federal Act applies to the Band, its provisions do *not* explicitly or plainly divest the Micmacs of their inherent tribal sovereign right to govern their own internal affairs----including their own employment decisions----as required by the decisions of this Court. That the Passamaquoddy Tribe and the Penobscot Nation both bargained for and obtained from the State of Maine (and eventually from the federal authorities) express, specific legislation in both the 1980 Federal Act and the State Implementing Act giving them jurisdiction over their internal tribal affairs only restates what each of these tribes *already possessed under federal common law*. It was redundant legislation which restates the inherent tribal rights of these two tribes; it was not a stepping stone for the court below to conclude that this restatement meant that the Micmacs do *not* now retain under the federal common law their own inherent tribal rights to self government and to make their own employment decisions.

In addition, the 1980 Federal Act fails to reflect any specific intent by Congress to divest *any* Indian group, including the Micmacs, of their inherent tribal sovereign right of self government. Instead, there is only the general statement that all Indian groups will be subject to state law. However, consistent with this Court's canons, this is *not* enough to divest the Micmacs of their inherent tribal rights. As the Court has made

clear, unless and until Congress explicitly carves out these inherent tribal rights in specific legislation and qualifies them----which the 1980 Federal Act has not done-----the Micmacs' inherent sovereign right to govern itself and to make its own employment decisions remains unhindered by the 1980 Federal Act.

Finally, if instead the 1991 Federal Micmac Act applies (the Micmacs submit that it does), there is no language whatsoever in this scheme from which to infer that Congress has divested the Micmacs of their inherent tribal authority to govern themselves or to make employment decisions. In fact, § 7(a) of the Act provides just the opposite: the Micmacs are given the opportunity to govern themselves, impliedly carrying with it the right to make their own employment decisions.

In this statutory analysis, the provisions of the State Implementing Act or the defunct State Micmac Act are ultimately immaterial for purposes of determining whether the Band's decision to discharge the tribe's employees is insulated from State regulations. State law cannot limit or qualify the tribe's inherent sovereignty to any greater extent than which Congress has already done through appropriate Federal legislation. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 207. *Bracker*, 448 U.S. at 141-143. *Mescalero*, 462 U.S. at 334.*McClanahan*, 411 U.S. at 170-171. Thus State legislation, even if operative, could not possibly have divested the Micmacs of their inherent tribal authority to govern themselves *without Congress having already done so* in explicit legislation.

Since Congress has not done so, State law could not accomplish this result. As a matter of statutory law, employing all of the canons of construction attendant to legislation affecting Indians, the court below should have ruled that the Micmacs were not divested of their inherent tribal authority to govern their own affairs or to make their own employment decisions free of State regulation. By ruling to the contrary, by wrongly resorting to the 1980 Federal Act to justify State regulation of the tribe's internal affairs, the court of appeals has substituted its will for the will of Congress and rendered two hundred years of Federal Indian jurisprudence a nullity.

Indeed, the court below continues to undercut Congress and this Court's decisions on the issue by again ruling that the 1980 Federal Act together with the State Implementing Act has stripped *all* Maine tribes of their inherent tribal rights rendering them fully subject to Maine law, except for the Passamaquoddy Tribe and the Penobscot Nation. See *State of Maine v. Johnson, et al.*, 2007 U.S. App. LEXIS 18761(1st Cir. 8/8/07).

C. As A Matter of Federal Common Law, Ignored By the Court Below, The Band Has The Inherent Right To Discharge Tribal Employees Arising From Consensual Employment Entirely On Tribal Lands.

In *Montana v. United States*, 450 U.S. 544, 564-567(1981), this Court held that Indian tribes have jurisdiction over nonmembers of the tribe for conduct on land not owned by the tribe but within its reservation boundaries when the nonmember has either entered into

a consensual relationship with the tribe or when the nonmember has engaged in conduct which would harm tribal interests. *Id. Strate v. A-1 Contractors*, 520 U.S. 438, 446(1997). *A fortiori*, where as here the nonmembers work entirely on tribal land held in trust for the tribe, working only for the tribal government itself on issues solely affecting tribe members, the tribe has the inherent authority to make employment-related decisions about its employees including those discharging them for cause and determining the propriety of their workplace discrimination claims.

This inherent right has been repeatedly recognized in federal common law, is embodied in the Tribal Employment Rule and is founded on such inherent tribal authority as is necessary to protect tribal self-government and to control its internal affairs. The "consensual relationship" includes the employment here, one founded upon a contract where each of the employees through acceptance of the employment manual acceded to the remedies the tribe made available in the event of discharge or other work-related problem. Moreover, the employment took place entirely on tribal lands where "the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. *Williams v. Lee*, 358 U.S. 217, 223(1959). As a matter of federal common law developed by this Court and the lower federal courts, the majority erred in divesting the Band of the inherent tribal authority to decide the workplace discrimination claims of the respondents.

2. The Court of Appeals' Ruling Conflicts With The Predominant View Of Other Courts of Appeals That A Federally Recognized Indian Tribe, Unless Specifically Prohibited From Doing So By Congress, Possesses The Inherent Sovereign Right To Decide Workplace Discrimination Claims Brought Against It By Employees Arising From Their Consensual Employment On Tribal Lands.

As adverted to Part 1., *supra*, at least four courts of appeals have followed the Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-governance or its administration is an "intramural" matter exempt from federal or state regulation. *Snyder v. Navaho Nation, supra. Gallegos v. Jicarilla Apache Nation, supra. Taylor v. Alabama Intertribal Council Title IV, supra. Fond du Lac Heavy Equip. & Constr. Co., Inc., supra.*

The decision below rejects the Tribal Employment Rule, refuses to acknowledge any form of inherent tribal rights in the wake of the 1980 Federal Act and the State Implementing Act and has concluded that other than the Passamaquoddy Tribe and the Penobscot Nation, no other tribe in Maine has the inherent tribal sovereignty, the right of self government, to withstand regulation by the State of their internal tribal affairs. This is demonstrably wrong, exposes the various Maine tribes, including the Micmacs, to unjustified and meddlesome State intervention in internal tribal matters, invoking the jurisdiction of this Court to resolve this controversy

in the Band's favor.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit, to vacate and reverse the judgment and remand the matter to the federal district court for the District of Maine with instructions that petitioner's cross motion for summary judgment be granted and that judgment enter enjoining the Commission from applying MHRA, MWPA or Title VII against the petitioner because under Federal Micmac Act or federal common law, the Band enjoys a statutory right of self-governance that prohibits the enforcement of State employment discrimination laws against the Micmacs; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Dennis P. Derrick
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

Douglas J. Luckerman
Counsel of Record
20 Outlook Drive
Lexington, MA 02421
(781)861-6535

(any footnotes trail end of each document)
Nos. 06-1127, 06-1358

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AROOSTOOK BAND OF MICMACS,
Plaintiff, Appellee,

v.

PATRICIA E. RYAN, in her official capacity as Executive Director of the Human Rights Commission of the State of Maine; WARREN C. KESSLER, in his official capacity as member of the Human Rights Commission of the State of Maine; PAUL K. VESTAL, JR., in his official capacity as member of the Human Rights Commission of the State of Maine; JAMES VARNER, in his official capacity as member of the Human Rights Commission of the State of Maine; JADINE R. O'BRIEN, in her official capacity as member of the Human Rights Commission of the State of Maine; KRISTEN L. AIELLO, in her official capacity as member of the Human Rights Commission of the State of Maine; LISA GARDINER; TAMMY CONDON, Defendants, Appellants,
BEVERLY AYOOB, Defendant.

April 17, 2007, Decided

As Amended, June 19, 2007.

COUNSEL: Christopher C. Taub, Assistant Attorney General, with whom G. Steven Rowe, Attorney General, and Paul Stern, Deputy Attorney General,

were on brief, for appellants Ryan, Kessler, Vestal, Varner, O'Brien, and Aiello.

Matthew S. Keegan, with whom Johnson & Webbert, LLP was on brief, for appellants Gardiner and Condon.

Douglas J. Luckerman, with whom Law Office of Douglas J. Luckerman, Gregory P. Dorr, Farrell, Rosenblatt & Russell, and David Kaplan were on brief, for appellee.

Michael A. Duddy and Kelly, Remmel & Zimmerman on brief for Houlton Band of Maliseet Indians, amicus curiae.

JUDGES: Before Lynch, Circuit Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge. LIPEZ, Circuit Judge, dissenting.

OPINION BY: LYNCH

OPINION

LYNCH, *Circuit Judge.* This case arises from a lawsuit brought by the Aroostook Band of Micmacs ("Aroostook Band"), an Indian tribe based in northern Maine. The tribe seeks to enjoin proceedings before the Maine Human Rights Commission ("the Commission"), a state agency which acted on discrimination complaints it had received from three of the tribe's former employees.

The Aroostook Band claims that federal law prevents an agency of the state of Maine from enforcing state employment discrimination laws against the Aroostook Band's government. The state disagrees and argues

that federal law specifically grants it this power. Both sides discuss a series of federal and state statutes: the state's 1979 Act to Implement the Maine Indian Claims Settlement ("state Settlement Act"), Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214; the federal Maine Indian Claims Settlement Act of 1980 ("MICSA" or "federal Settlement Act"), 25 U.S.C. §§ 1721-1735; the 1989 state Micmac Settlement Act ("state Micmac Act"), Me. Rev. Stat. Ann. tit. 30, §§ 7201-7207; and the 1991 federal Aroostook Band of Micmacs Settlement Act ("ABMSA" or "federal Micmac Act"), Pub. L. No. 102-171, 105 Stat. 1143 (codified at 25 U.S.C. § 1721 note). This case turns on the interpretation of these statutes.

The magistrate judge, presiding with the consent of the parties, *see* Fed. R. Civ. P. 73(b), concluded that the 1991 ABMSA gives the Aroostook Band the protection it claims.

We reverse. We hold that a provision of the 1980 MICSA, 25 U.S.C. § 1725(a), clearly makes the Aroostook Band "subject to . . . the laws of the State . . . to the same extent as any other person." This abrogates any aspects of tribal immunity which might have prevented application of Maine's employment laws to the dispute here. We also hold that the later-enacted ABMSA is not in conflict with, nor has it implicitly repealed, § 1725(a). We finally hold that the question in this case is resolved by these two federal statutes -- both of which are settlement acts -- and not by Indian common law.

I. BACKGROUND

We start with the history behind the enactment of the state and federal Settlement Acts, and the later state and federal Micmac Acts. We then move to the background and procedural history of the events that led to this appeal. Much of the background, statutory and otherwise, is also recounted in an earlier opinion in this case. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 50-55 (1st Cir. 2005) ("*Aroostook II*"), *overruled in part by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25 (1st Cir. 2006)(en banc).

A. The Statutory Background

In the 1970s, two Maine Indian tribes -- the Penobscot Nation and the Passamaquoddy Tribe -- filed suit and claimed ownership over much of the land in the state of Maine. *See id.* at 53; *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707 (1st Cir. 1999). *See generally Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (providing additional background on the litigation).

With the assistance of the federal government, the Penobscots and the Passamaquoddy ultimately reached a settlement with the state. *Aroostook II*, 404 F.3d at 53. The first step in this settlement was Maine's passage of its state Settlement Act in 1979. *See* 1979 Me. Laws 2393; *see also Aroostook II*, 404 F.3d at 53. Among other things, that act set out to define the legal relationship between Maine and its Indian tribes. One general provision states that except as otherwise provided by the act, all Indian tribes "shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person." Me. Rev. Stat. Ann. tit. 30, § 6204.

For shorthand, we use the phrase "Maine law" to refer to the provisions invoked by the "subject to" clause.

Another part of the statute deals specifically with the two tribes that had then filed suit; it provides that the Penobscot Nation and the Passamaquoddy Tribe have the powers and limitations of Maine municipalities, and are "subject to the laws of the State," except that the State does not have the power to regulate "internal tribal matters." *Id.* § 6206(1). By its terms, that exception in the state act does not apply to any other tribe.

The Aroostook Band, which had not filed suit or asserted any claim, is not mentioned anywhere in the state Settlement Act. However, another Maine tribe, the Houlton Band of Maliseet Indians ("Houlton Band"), is mentioned in several places. Although by 1979 the small Houlton Band had not filed suit against the state, it too was asserting that it had valid claims to parts of land in Maine. *See id.* § 6202. Nevertheless, at that time Maine was "reluctant to accord [the Houlton Band] special status," *Aroostook II*, 404 F.3d at 54, and the Houlton Band was not originally included in the compromise. Indeed, the state Settlement Act does not by its terms grant the Houlton Band any of the benefits that it grants the Penobscots and Passamaquoddy. In its section on legislative purposes, the state Settlement Act declares that in contrast to the arrangement with the Passamaquoddy and the Penobscots, "[t]he Houlton Band . . . will be wholly subject to the laws of the State." Me. Rev. Stat. Ann. tit. 30, § 6202.

The next step was the 1980 passage of MICSA, the federal Settlement Act. *See* Pub. L. No. 96-420, 94 Stat.

1785. A stated purpose of the Congress enacting MICSA was to "ratify" the state Settlement Act. 25 U.S.C. § 1721(b)(3). Even so, MICSA differs from its state counterpart in several respects, including the fact that MICSA grants some benefits to the Houlton Band. Like the state act, MICSA does not mention the Aroostook Band by name, but it does address issues relevant to all Maine tribes.

MICSA extinguished the land claims of *all* Indian tribes in Maine, by express provision. *Id.* § 1723. In exchange, MICSA gave several benefits to the Passamaquoddy, Penobscots, and Houlton Band, including federal recognition for all three tribes and eligibility for certain federal Indian programs. *See id.* § 1725(i). MICSA also created a sizable trust fund for the three tribes to use for acquiring land. *Id.* § 1724(d). Of the money in the fund, $ 26.8 million was for the Passamoquoddy's benefit, $ 26.8 million was for the benefit of the Penobscots, and $ 900,000 was for the benefit of the Houlton Band. *Id.*

Several MICSA provisions deal with the relationship between all Maine tribes and state law. Here the statute draws distinctions. As does the state Settlement Act, MICSA treats Maine's relationship with the Passamoquoddy and Penobscots differently from Maine's relationship with all other tribes. MICSA states that

all Indian[] . . . tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe [and] the Penobscot Nation, . . . shall be subject to the civil and criminal jurisdiction of the State [and] the laws of the

State . . . to the same extent as any other person . . . therein.*Id.* § 1725(a) (emphasis added).[1]

A separate subsection of the federal MICSA deals with the applicability of Maine law to the Passamaquoddy and Penobscots; that subsection expressly references the state Settlement Act and declares that "that Act is hereby approved, ratified, and confirmed." *Id.* § 1725(b)(1).

In the late 1980s, there was further legislative action. The Aroostook Band, after meeting with counsel, determined that it too might have had a potential land claim before the passage of the 1979 and 1980 state and federal settlement acts. *See Aroostook II*, 404 F.3d at 54. MICSA's language had, however, extinguished any potential land claim. The Aroostook Band nevertheless opened a dialogue with the state. After negotiations, the Maine legislature passed the state Micmac Act. *See* 1989 Me. Laws 230.

The terms of the state Micmac Act gave the Aroostook Band a status similar to that accorded the Houlton Band, and different from the status given the Penobscots and Passamaquoddy. *Aroostook II*, 404 F.3d at 54. The Houlton Band, mentioned explicitly in the two prior settlement acts, had been expressly made "subject to the civil and criminal jurisdiction of the State [and] the laws of the State . . . to the same extent as any other person . . . therein." 25 U.S.C. § 1725(a). As for the Aroostook Band, the state Micmac Act provided that "[e]xcept as otherwise provided in this Act, the Aroostook Band of Micmacs . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent

as any other person. . . therein." Me. Rev. Stat. Ann. tit. 30, § 7203. Another provision stated that, unlike the Passamaquoddy and the Penobscots, "[t]he Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality." *Id.* § 7205.

The parties now dispute whether the state Micmac Act actually took effect as a matter of state law. The Aroostook Band argues that the state Micmac Act is ineffective under state law, so the clauses of that Act, cited above, do not apply and the Aroostook Band is not subject to state law.[2] For reasons we describe later, we think this dispute over state law is not material.

As of the early 1990s, all of the concerned entities apparently treated the state Micmac Act as validly enacted. Accordingly, their next step was to persuade Congress to enact ABMSA, the federal Micmac Act. Congress did so in 1991. *See* Pub. L. No. 102-171, 105 Stat. 1143. The terms of the federal ABMSA, and the effect that they have on the earlier-enacted federal MICSA, are at the heart of the resolution of this case.

ABMSA declares, in its findings section, that the Aroostook Band was not referred to in MICSA because in 1980 there had been insufficient historical evidence of the tribe's presence in Maine. ABMSA § 2(a)(2). That documentation had become available, *id.* § 2(a)(3), and so Congress decided that it was "now fair and just" to give the Aroostook Band "the same settlement provided to the Houlton Band" in MICSA, *id.* § 2(a)(5). ABMSA also states that one of its purposes is to "ratify the [state Micmac Act], which defines the relationship

between the State of Maine and the Aroostook Band of Micmacs." *Id.* § 2(b)(4).

Among other provisions, ABMSA provided the Aroostook Band with a $ 900,000 land acquisition fund, *see id.* §§ 4(a), 10, gave the Aroostook Band federal recognition, *see id.* § 6(a), and authorized the Aroostook Band to "organize for its common welfare and adopt [a governing] instrument," *see id.* § 7(a). ABMSA applies federal law to the Aroostook Band in the same manner as MICSA applied federal law to the other three Maine tribes. *Id.* § 6(b). However, as to the application of Maine law, ABMSA does not repeat the language of the state Micmac Act, nor does it repeat the language of MICSA. It has no language directly on this topic at all. *See Aroostook II*, 404 F.3d at 55. ABMSA does empower the State and the Aroostook Band to reach their own agreement regarding Maine's jurisdiction over tribal lands, *see* ABMSA § 6(d), but it appears that no agreement has yet been reached that would be relevant to this case.

ABMSA also contains a "conflicts" provision: it states that if there is "a conflict of interpretation between the provisions of the [state Settlement Act, state Micmac Act, or MICSA] and this Act, the provisions of this Act shall govern." *Id.* § 11.

B.The History of this Litigation: The Maine Law Discrimination Claims Against the Aroostook Band

During 2001 and 2002, the Aroostook Band fired three of its employees: Lisa Gardiner, Tammy Condon, and Beverly Ayoob. Gardiner was the Band's Chief Financial Officer, Condon was its Compliance Officer,

and Ayoob was its Housing Director. *Aroostook II*, 404 F.3d at 50. Gardiner and Condon alleged that they had been the victims of employment discrimination on the basis of their race, color, and national origin, in violation of the Maine Human Rights Act (MHRA), Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634, and that they had been unlawfully retaliated against in violation of the MHRA and the Maine Whistleblowers' Protection Act (MWPA), Me. Rev. Stat. Ann. tit. 26, §§ 831-840.[3] *Aroostook II*, 404 F.3d at 51. Ayoob also alleged she had been the victim of unlawful discrimination and retaliation under these statutes. *Id.* All three filed complaints with the Commission, a state agency which investigates discrimination charges, *see* Me. Rev. Stat. Ann. tit. 5, § 4566. *Aroostook II*, 404 F.3d at 51. In all three cases, the Commission in turn filed charges with the United States Equal Employment Opportunity Commission. *Id.* The Aroostook Band asked the Maine Commission to dismiss the complaints, arguing that the Commission had no jurisdiction over the Band. *Id.* The Commission refused, and it investigated the complaints. *Id.*

The Aroostook Band then filed suit in U.S. District Court against the Commission's members, and against Condon, Gardiner, and Ayoob. *Id.* at 51-52. It sought declaratory and injunctive relief, asserting five claims: 1) that ABMSA and/or the Aroostook Band's inherent sovereignty prohibited the Commission from enforcing the state MHRA and MWPA against it, 2) that the Aroostook Band's sovereign immunity[4] achieved the same result, 3) that the Aroostook Band was statutorily exempt from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, 4) that Title VII preempts application of the state MHRA and MWPA

against an Indian tribe, and 5) that the Aroostook Band was not an "employer" within the meaning of either the state MHRA or MWPA statutes.

The magistrate judge initially dismissed all claims for lack of federal jurisdiction under Rule 12(h)(3). *See Aroostook Band of Micmacs v. Executive Dir. Me. Human Rights Comm'n*, 307 F. Supp. 2d 95, 96 (D. Me. 2004) ("*Aroostook I*"). A panel of this court reversed on the grounds that the first four claims were properly brought in federal court. *See Aroostook II*, 404 F.3d at 67, 69, 71, 73. The panel remanded all five claims, as there was possible pendent jurisdiction over the final state law claim. *See id.* at 73; *see also* 28 U.S.C. § 1367.

Part of the panel's opinion found that there was a distinction between tribal sovereign immunity and inherent tribal authority. *See Aroostook II*, 404 F.3d at 67-68. That part of the opinion was later overruled by this court's en banc opinion in *Narragansett*. 449 F.3d at 24-25.

On remand, the magistrate judge considered the merits of both parties' motions for summary judgment. Judgment was entered for the Aroostook Band on its first claim: that ABMSA and/or inherent sovereignty protects the tribe's employment decisions from Maine law. *See Aroostook Band of Micmacs v. Ryan*, 403 F. Supp. 2d 114, 130 (D. Me. 2005) ("*Aroostook III*"). The magistrate judge's decision predated the issuance of our en banc opinion in *Narragansett*.

The magistrate judge's reasoning had two primary parts. First, the magistrate judge concluded that the state Micmac Act, with its language subjecting the

Aroostook Band to state law, had never taken effect. *Id.* at 119-22. This failure to become effective, the judge held, was not cured by ABMSA, even though the federal act stated it was ratifying its state counterpart.

Id. at 122-23.

Second, the magistrate judge concluded that while MICSA had subjected the Aroostook Band to Maine law, this aspect of MICSA was effectively and impliedly abrogated by two provisions in ABMSA: the grant of federal recognition to the Aroostook Band in § 6(a), and the authorization in § 7(a) for the Aroostook Band to organize its government. *Id.* at 124-30. Both provisions of ABMSA, the magistrate judge held, were in conflict with MICSA, and the conflicts were resolved in the Aroostook Band's favor pursuant to ABMSA's § 11. *Id.* at 124-26.

The magistrate judge permanently enjoined the Commission defendants from applying the MHRA and MWPA to the Aroostook Band, *id.* at 133, and also issued a declaratory judgment to similar effect against Gardiner, Condon, and Ayoob.[5] The Commission defendants and defendants Gardiner and Condon all appealed. We consolidated the appeals, and we now reverse.

II. AN OVERVIEW

We review de novo the magistrate judge's disposition of the cross-motions for summary judgment. *Jalbert Leasing, Inc. v. Mass. Port Auth.*, 449 F.3d 1, 2 (1st Cir. 2006).

There are several major strands to the Aroostook Band's argument. First, the Aroostook Band argues that MICSA did not subject the tribe's government to state employment law. Second, even if MICSA did have this effect, the tribe contends that this aspect of MICSA was abrogated by and is in conflict with ABMSA. Throughout, the Aroostook Band interprets the relevant statutes in light of its notions of inherent tribal sovereignty, as protected under federal Indian common law.

The precise question we face is whether Maine is precluded from applying its employment statutes when these statutes permit individuals employed by the Aroostook Band's government to file and pursue discrimination complaints with the Commission and through any judicial review thereafter. While the parties have argued in broad terms before us, that is the narrow issue that we decide.[6]

Our conclusion is that this dispute is resolved in Maine's favor based on two federal statutes, MICSA and ABMSA, both of which were statutes designed to settle Indian claims. These settlement acts displaced any federal common law that might otherwise bear on this dispute. MICSA clearly and unequivocally establishes that Maine law applies to the Aroostook Band. And ABMSA does not either explicitly or implicitly conflict with or override MICSA on this point. It instead reinforces this aspect of MICSA.

Whether or not the state Micmac Act ever became effective under state law is not an issue we need to decide. As a federal court, we would be reluctant in any event to decide such a difficult and complex issue of

state law without guidance from Maine's Supreme Judicial Court. Our analysis and the resolution of these issues turn entirely on federal law.

III. MICSA'S EFFECT ON THE AROOSTOOK BAND

A. MICSA's Text

Maine relies on MICSA's language to support its argument that MICSA subjected the Aroostook Band to state employment law. Specifically, MICSA declares that

> all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.25 U.S.C. § 1725(a). By its clear terms, § 1725(a) makes all Maine tribes, other than the Passamaquoddy Tribe and the Penobscot Nation, "subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State."[7]

The Aroostook Band argues that even while MICSA made it "subject to . . . the laws of the State," the

statute did not go so far as to subject the *internal tribal matters* of the Aroostook Band to state law.[8] It contends that it retains authority over these matters as part of its inherent tribal sovereignty. We discuss in a later section why Congress's intent in MICSA to ratify the state Settlement Act, grouped with that state statute's treatment of "internal tribal matters," defeats this claim. But in this section we also provide several other reasons to reject the argument.

1. *Statutory Clarity and the Abrogation of Sovereignty*

The Aroostook Band relies on rules of statutory construction that "obligate us to construe 'acts diminishing the sovereign rights of Indian tribes . . . strictly,' 'with ambiguous provisions interpreted to the [Indians'] benefit.'" *Fellencer*, 164 F.3d at 709 (ellipsis and alteration in original) (internal citations omitted) (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)). The Aroostook Band asserts that prior to MICSA's enactment, it had the power to control all of its own employment matters as part of its inherent sovereignty. It contends that, judged against a backdrop of federal common law protecting Indian sovereignty, *see Rhode Island*, 19 F.3d at 701, MICSA was not clear enough to subjugate this aspect of the tribe's sovereignty to Maine law.

We disagree. Whatever powers are included within "inherent tribal authority," Congress may abrogate those powers by statute. *See United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); *Washington v. Confederated Bands & Tribes of the*

Yakima Indian Nation, 439 U.S. 463, 470-71, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). Although Congress must do so clearly, "there is no requirement that talismanic phrases be employed. Thus, an effective limitation . . . need not use magic words." *Narragansett*, 449 F.3d at 25.[9]

MICSA is clear. In § 1725(a) it not only made Maine Indians "subject to . . . the laws of the State," and "subject to the civil and criminal jurisdiction of the State," but it expressly added the emphasizing phrase "to the same extent as any other person." And § 1725(a) not only applies to "Indians," but also to the "Indian nations, . . . tribes[, and] bands of Indians" themselves. Short of using "magic words," it is hard to imagine how § 1725(a) could have been clearer. There is no "internal tribal matters" exception in the statute.

The Aroostook Band tries to interpret this clear statement by Congress as nevertheless exempting specific units of tribal government. Aided by the Houlton Band as amicus, the Aroostook Band sees significance in the fact that § 1725(a) does not apply state law to governing bodies like the Aroostook Micmac Council or the Houlton Band Council. *Cf.* 25 U.S.C. § 1722(a) (stating that the Houlton Band is "represented" by the Houlton Band Council); ABMSA § 3(a) (stating that the Aroostook Band is "represented" by the Aroostook Micmac Council). The inference we are asked to draw is that § 1725(a) applies state law to Maine tribes as "polities" but not to their governments.

This argument lacks merit. It is not a natural reading of the language and it creates an artificial distinction merely to suit tribal purposes. Further, MICSA

recognizes that a governing Council exists as a *representative* of a tribe. *See* 25 U.S.C. § 1722(a). It is the tribe itself, as a legal entity, whose interest in sovereignty is really at issue.[10] *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (explaining that a tribal housing authority had sovereign immunity because it was "an arm of the [t]ribe"); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (holding that the members of a tribal government, sued in their official capacities, were protected by sovereign immunity because any relief would "run against the [t]ribe itself"). Under MICSA, § 1725(a) applies state law to "Indian nations, . . . tribes[,] or bands." That is what matters. *See Narragansett*, 449 F.3d at 30 (holding that tribal officers have no sovereign immunity when they engage in activities that the tribe itself cannot lawfully authorize).

Amicus presents another argument why § 1725(a) was not clear in its abrogation of either Houlton or Aroostook tribal sovereignty.[11] Under 25 U.S.C. § 1727(a), the Passamaquoddy and the Penobscots have the opportunity to petition for "exclusive jurisdiction" over certain child custody matters. Amicus contends that the use of "exclusive jurisdiction" here, in contrast with the use of the sole word "jurisdiction" in § 1725(a), means that § 1725(a) merely grants the state "nonexclusive authority and concurrent jurisdiction to apply [s]tate law" to tribes like the Houlton Band and Aroostook Band.

But amicus ignores the fact that elsewhere in MICSA, the Passamaquoddy and the Penobscots were "authorized to exercise jurisdiction, separate and

distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the [state Settlement Act]." *Id.* § 1725(f). No such jurisdictional authorization was provided to the other Maine tribes, and thus we think it would clearly defeat congressional intent to nevertheless imply one. The language about "exclusive jurisdiction" in § 1727(a) is plainly nothing more than a helpful clarification in light of the peculiar jurisdictional status of the Penobscots and Passamaquoddy. It does not turn § 1725(a) into a mere grant of concurrent jurisdiction. The meaning of MICSA's § 1725(a) is clear: Maine law applies to this situation.

2. *Statutory Clarity in Context: Indian Statutes in Supreme Court Case Law*

The Aroostook Band attempts to undercut the clarity of MICSA by comparing it to statutes -- most notably Public Law 280 and the Menominee Indian Termination Act of 1954 -- examined in several Supreme Court cases.

MICSA stands in stark contrast to Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Public Law 280 is the statute discussed in *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976), a case on which the Aroostook Band relies. *Bryan* addressed the part of the statute that gave certain states

jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State has

jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.28 U.S.C. § 1360(a). The Court found this statute did not clearly give states civil regulatory jurisdiction over Indians, and it interpreted the ambiguity for the Indians' benefit by precluding the application of a state property tax. *See Bryan*, 426 U.S. at 392-93.

In finding Public Law 280 ambiguous, the Court relied on reasons that are inapplicable to MICSA's § 1725(a). First, the Court examined Public Law 280's legislative history and concluded that its civil law provisions were primarily designed to address "the lack of adequate Indian forums for resolving private legal disputes." *Id.* at 383; *see also id.* at 379-87. Viewed in this light, when Public Law 280 gave force to "the civil laws of [the] State" pertaining to "private persons or private property," 28 U.S.C. § 1360(a), it was merely providing state rules of decision and a state forum for private disputes, and it was not attempting to infringe more deeply on tribal sovereignty. *Bryan*, 426 U.S. at 383-84. MICSA has no such legislative history, nor does it contain similar language specifically addressed to "private" legal disputes. *Cf. Narragansett*, 449 F.3d at 28 (noting the narrowness of Public Law 280).

More importantly, the Court in *Bryan* stressed that Public Law 280 lacked "any conferral of state jurisdiction over the tribes themselves." 426 U.S. at 389. In contrast, § 1725(a) expressly *does* apply to Indian tribes in addition to their members.

The Aroostook Band also cites to *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968), but *Menominee* does not assist the tribe. *Menominee* involved a federal statute, the Menominee Indian Termination Act of 1954, 68 Stat. 250 (repealed 1973), which stated that "the laws of the several States shall apply to the [Menominee] tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 391 U.S. at 410 (quoting 25 U.S.C. § 899 (repealed 1973)) (internal quotation marks omitted). The Supreme Court refused to read this language as abrogating certain hunting and fishing rights that the Menominee Tribe had obtained in an 1854 treaty. *Id.* at 412-13. The Aroostook Band asks us to reach a comparable result here as it contends that the language in the Termination Act is similar to the language in MICSA.

We disagree and find *Menominee* not only easily distinguishable, but in fact supportive of our reading of MICSA. *Menominee*'s holding is not that the Termination Act *alone* was too unclear to abrogate aspects of tribal sovereignty. Instead, *Menominee* held that the Termination Act needed to be considered in pari materia with Public Law 280, which was contemporaneously passed and which explicitly said it was not interfering with Indian hunting and fishing rights granted by treaty. *Id.* at 410-11. The *combination* of these two statutes created enough ambiguity to favor preservation of Indian rights. With MICSA there is no similar federal statute, passed roughly contemporaneously, that could create a comparable ambiguity. To the contrary, the federal statutory scheme is a consistent whole on the issue in question.

Nor is this the sole fact that distinguishes *Menominee*. For instance, the Termination Act was abrogating a treaty right, which meant that rules of statutory construction favoring Indians were bolstered by the rule that "the intention to abrogate or modify a treaty is not to be lightly imputed to . . . Congress." *Id.* at 413 (quoting *Pigeon River Improvment, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160, 54 S. Ct. 361, 78 L. Ed. 695 (1934)) (internal quotation marks omitted). By contrast, this case does not involve any treaty. Additionally, the *Menominee* Court drew support from statements by the Termination Act's chief sponsor; he had declared that the act "'in no way violates any treaty obligation with this tribe.'" *Id.* (quoting 100 Cong. Rec. 8537, 8538 (1954) (statement of Sen. Watkins)). The Aroostook Band has pointed to no legislative history for MICSA that is similarly so on point.

The Supreme Court's decision in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986), puts *Menominee* in context and further confirms our reading of MICSA. *Catawba* interpreted a statute virtually identical to the Termination Act in *Menominee*. *See* Catawba Indian Tribe Division of Assets Act, Pub. L. No. 86-622, 73 Stat. 592 (1959) (repealed 1993). That Catawba statute declared: "[T]he [Catawba] tribe and its members shall not be entitled to [certain federal services] . . ., and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." 25 U.S.C. § 935 (repealed 1993); *see also Catawba*, 476 U.S. at 505. Without a contemporaneously passed statute like Public Law 280 to add ambiguity, the Supreme Court found it

"unmistakably clear" that "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others." *Catawba*, 476 U.S. at 505-06; *see also id.* at 509 n.20 (distinguishing *Menominee* on this basis). MICSA is similarly clear.

3. *Statutory Clarity and The Tribal Employment Rule*

Despite the statutory clarity, and the Supreme Court case law reinforcing this clarity, the Aroostook Band urges us to apply what it calls the "Tribal Employment Rule." What it means by this is that there are a number of cases, all from other jurisdictions and involving differently situated tribes,[12] holding that general *federal* employment statutes do not apply to tribal employers despite these statutes' silence on that issue. *See, e.g., Snyder v. Navajo Nation*, 382 F.3d 892, 894-95 (9th Cir. 2004) (tribal employer exempt from Fair Labor Standards Act); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035-36 (11th Cir. 2001) (tribal employer insulated from employment discrimination claim under 42 U.S.C. § 1981); *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1286 (10th Cir. 2000) (tribal employer not covered by National Labor Relations Act); *cf.* 42 U.S.C. § 2000e(b) (explicitly providing that for purposes of Title VII, the term "employer" does not include an Indian tribe).

These cases are inapposite. The fact that a tribe may be exempt from federal employment laws says little regarding that tribe's status under state employment laws, particularly where Congress has enacted settlement acts. None of these cases say that tribal employment decisions are somehow insulated from state law in the face of a federal statute that specifically

applies state laws to tribes.[13] We think the "Tribal Employment Rule" is inapplicable in the face of MICSA's clarity.

B. The State Settlement Act and Its Relationship to MICSA

We have held that as a matter of reading MICSA, § 1725(a) clearly subjects the Aroostook Band to Maine law in this situation. That is enough. But because the Aroostook Band relies heavily on notions of equity, we also consider the terms of the state Settlement Act. The terms of that act reinforce our reading of MICSA's language and intent. Indeed, MICSA purported to ratify that state act. *See* 25 U.S.C. § 1725(b)(1); *see also Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (treating the "internal tribal matters" exception contained in the state Settlement Act as incorporated into federal law).

The state Settlement Act explicitly created an "internal tribal matters" exception for the Passamaquoddy and the Penobscots and *not* for the Houlton Band, the Aroostook Band, or any other Maine tribe. *Compare* Me. Rev. Stat. Ann. tit. 30, § 6204 (providing that "[e]xcept as otherwise provided in this Act, all Indians, Indian Nations, and tribes and bands of Indians in [Maine] . . . shall be subject to the laws of the State . . . to the same extent as any other person"), *with id.* § 6206(1) (providing that "internal tribal matters" of the Passamaquoddy and the Penobscots "shall not be subject to regulation by the state"). MICSA's choice of language echoed the state Settlement Act by providing one legal regime for the Penobscots and Passamaquoddy, and a different regime for other

tribes. *Compare* 25 U.S.C. § 1725(a) (subjecting all Indians in Maine, "other than the Passamaquoddy Tribe, the Penobscot Nation, and their members" to state law to the same extent as any other person), *with id.* § 1725(b)(1) (discussing Maine's jurisdiction over the Penobscots and Passamaquoddy).

The Aroostook Band takes issue with this understanding of the state law. It argues that while the "internal tribal matters" exception in the state Settlement Act refers only to the Penobscots and the Passamaquoddy, the internal matters of *all* Maine tribes are free from state regulation. The Aroostook Band contends that the exception in the statute is "actually a savings clause that preserves certain aspects of inherent tribal sovereignty and self-governance rights that generally apply to all Indian tribes." It posits that such a savings clause was needed for the Penobscots and the Passamaquoddy to clarify their retained sovereignty despite their unique status as municipalities under Maine law. Since the other Maine tribes were not given municipal status, the Aroostook Band argues that no "internal tribal matters" exception was needed for them in the state Settlement Act, so little should be inferred from congressional failure to place such an exception in MICSA.

We disagree with this innovative reading of the state Settlement Act. It is not a rational reading of the language. And the reading is also in tension with our precedent. We have held that the "internal tribal matters" exception has its own unique meaning, and that it does not invoke all of Indian common law.[14] *See Fellencer*, 164 F.3d at 709-13 (treating Indian common law as but one factor in determining whether

something is an "internal tribal matter"); *Akins*, 130 F.3d at 488-90 (same); *see also id.* at 489 (refusing to read the exception "as invoking all of prior Indian law" because "[t]hat would be inconsistent with the unique nature of the Maine settlement"). This is hardly the effect we would expect from a "savings clause."[15]

The Aroostook Band's reading of the exception is also undercut by strong evidence of legislative intent. The state Settlement Act clearly intended to give the Penobscots and the Passamaquoddy more independence from state law than it gave the Houlton Band (the only other Maine tribe that asserted a claim at the time that act was passed). In its findings section, the state Settlement Act declares: "[T]he Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State." Me. Rev. Stat. Ann. tit. 30, § 6202. It would be illogical to conclude that the Houlton Band had received the same exemptions from state law that had been granted to the two larger tribes. And if the Houlton Band was not given these exemptions, certainly the Aroostook Band did not receive them either.[16]

IV. THE STATUS OF THE AROOSTOOK BAND UNDER ABMSA

In the previous section, we concluded that MICSA clearly subjected the Aroostook Band to state employment laws -- a conclusion we reached both from MICSA's language and from its context in relation to the state Settlement Act. "[W]hen two statutes are

capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). We think that MICSA and the later-enacted ABMSA are capable of co-existence, and there is no clearly expressed congressional intention that ABMSA makes Maine law inapplicable here despite MICSA's language.

The Aroostook Band's argument to the contrary proffers two ABMSA provisions as conflicting with MICSA: § 6(a), which gives the Aroostook Band federal recognition, and § 7(a), which authorizes the Aroostook Band to adopt a governing instrument and organize for its common welfare. When read alongside ABMSA § 11, the conflicts provision, the Aroostook Band believes that ABMSA codifies the tribe's inherent sovereignty and insulates its employment decisions from state law. In an attempt to reinforce its reading of §§ 6(a) and (7)(a), the Aroostook Band also appears to argue that ABMSA impliedly repeals parts of MICSA. We disagree with these arguments. Additionally, we disagree with the repeal argument that is offered by our dissenting colleague (and that was not advanced by the Aroostook Band).

A. Section 6(a): Federal Recognition

The Aroostook Band contends that when ABMSA gave it federal recognition, it used a "term of art" that entitles the tribe to a variety of privileges and immunities.[17] *Cf.* 25 C.F.R. § 83.2 (explaining that recognition means that a "tribe is entitled to the immunities and privileges available to other federally

acknowledged Indian tribes by virtue of their government-to-government relationship with the United States"). Among those privileges, we are told, is freedom from the application of state law.

We flatly reject the argument. MICSA contains express terms to the contrary. It gave the Penobscots and the Passamaquoddy "federal recognition," *see* 25 U.S.C. § 1725(i), and yet those tribes are subject to limits that do not apply to other federally recognized tribes. *See Akins*, 130 F.3d at 485, 489. *Compare* 25 U.S.C. § 1724(e) (placing restrictions on the authority of the United States to take land into trust on behalf of Maine tribes), *with id.* § 465 (giving the Secretary of the Interior discretion to take lands into trust on behalf of Indian tribes).[18] Moreover, even though MICSA recognized the Houlton Band, it plainly subjected that tribe to state law to a greater extent than it subjected the Penobscots and Passamaquoddy. To interpret "recognition" as a grant of sovereignty would require us to undo this differing treatment.

Indeed, it is hard to see how the Congress that enacted MICSA intended recognition to be a "grant" of sovereignty at all. That Congress understood Maine tribes to be able to invoke sovereign powers even without recognition: our court had decided as much in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064-66 (1st Cir. 1979), and Congress was plainly aware of our holding, *see* H.R. Rep. No. 96-1353, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3790 (noting *Bottomly*'s holding regarding inherent sovereignty); S. Rep. No. 96-957, at 14 (1980) (same).

Thus we understand "recognition," at least as used in

MICSA, to be merely an acknowledgment that the Passamaquoddy, the Penobscots, and the Houlton Band are eligible for particular federal tax treatment and benefits. It is telling that MICSA only grants federal recognition as part of two sentences dealing with financial benefits and taxes:

> As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective tribe, nation, or band . . . shall be considered Federal Indian reservations for purposes of Federal taxation.25 U.S.C. § 1725(i).

We have no reason to think that ABMSA's grant of "recognition" used a "term of art" that meant something different from MICSA's use of the term. Like the similar provision in MICSA, ABMSA § 6(a) grants recognition as part of a provision discussing federal financial benefits.[19] Although there are small differences in wording, those differences cannot plausibly be read as relevant to the Aroostook Band's claimed exemption from employment laws, and the Aroostook Band does not so argue.

B. Section 7(a): Government Organization and

Documents

The Aroostook Band also points to ABMSA § 7(a) as "affirming" the Aroos took Band's right to "self-governance." The Aroostook Band infers that, as a result, it is not subject to state laws in this case. Section 7(a) states:

> The [Aroostook] Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and any amendments thereto.The Aroostook Band reads this language as allowing it "to determine the structure and internal operations of [its] governing body," a power which it contends gives it an exemption from state employment law.

We disagree with this extremely broad reading. First, by its plain terms, § 7(a) says nothing about conferring an exemption from state laws. It merely allows the Aroostook Band to "organize for its common welfare" and "adopt an appropriate instrument in writing to govern [tribal] affairs." The language cannot be read to exclude the Aroostook Band from discrimination suits brought by former employees.

Second, our view is strengthened by comparing § 7(a) to a similar provision in MICSA. Section 7(a) is clearly based on virtually identical language contained in MICSA's § 1726(a). That subsection stated:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of [this act] and the [state Settlement Act]. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.25 U.S.C. § 1726(a). If we were to accept the Aroostook Band's argument about the meaning of this language, we would be forced to conclude that § 1726(a) acted to exempt the Houlton Band from the provisions of § 1725(a) (which applies Maine law to the Houlton Band).[20] That conclusion fails on the face of the statute itself: § 1725(a) contains several exceptions for other MICSA provisions, and § 1726(a) is not one of them.

Indeed, the Aroostook Band's argument amounts to a claim that ABMSA § 7(a) (and MICSA's § 1726(a)) provide the functional equivalent of the "internal tribal matters" exception granted to the Passamaquoddy and the Penobscots. They plainly do not. Congress invoked different language, and it intended different treatment of the Passamaquoddy and Penobscots on the one hand, and the remaining Maine tribes on the other.[21]

While it is not necessary to consult legislative history at all, that history reveals that MICSA's § 1726(a) -- and thus ABMSA § 7(a) -- cannot be read as the equivalent of the "internal tribal matters" exception. Rather, the language in § 1726(a) was meant to serve an entirely

different purpose. The language was added at the suggestion of the Secretary of the Interior, Cecil Andrus, who saw a "conceptual problem" with the fact that the Penobscots and the Passamaquoddy were given municipal status under the state Settlement Act. *See Proposed Settlement of Maine Indian Land Claims: Hearings on S. 2829 Before the S. Select Comm. on Indian Affairs*, 96th Cong. 38 (1980) [hereinafter *MICSA Senate Hearings*] (statement of Secretary Andrus). Maine municipalities derive their authority from charters, and Secretary Andrus noted that the tribes would have no charters, constitutions, or other governing documents. *Id.* at 37-38. Additionally, because the tribes were going to have large land holdings, the Secretary thought it advisable that they adopt organic governing documents, and that these be on file with the Department of the Interior. *See* Letter from Cecil D. Andrus, Secretary, United States Department of the Interior, to John Melcher, Chairman, Senate Select Committee on Indian Affairs (Aug. 8, 1980), *reprinted in MICSA Senate Hearings* at 95, 103. These rationales have nothing to do with inherent sovereignty.[22]

The Aroostook Band disputes this reading of MICSA's legislative history by pointing out that § 1726(a) was based on similar language in the Indian Reorganization Act ("IRA"), Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 476). *See MICSA Senate Hearings* at 38 (statement of Secretary Andrus) (referring to the IRA). In light of the IRA's clear purpose of furthering tribal self-government, *see Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985), the Aroostook Band contends that § 1726(a) also vests

tribes with "full[] . . . self-governing authority." But this case does not involve construction of the general terms of the IRA. It instead involves the interpretation of more specific laws, whose interpretation we have explained. Indeed, the Aroostook Band has pointed us to no authority interpreting the relevant section of the IRA, § 16, to have the meaning that the tribe urges on us.[23]

C. Remaining ABMSA Arguments

1. *ABMSA as a Repeal of MICSA: The Aroostook Band's Position*

The Aroostook Band makes another argument, designed to advance its claim that ABMSA §§ 6(a) and/or 7(a) give it an exemption from state employment laws. It points to the fact that two ABMSA sections, 6(b) and 8(a), specifically invoke parts of MICSA as applicable to the Aroostook Band. Section 1725(a) is not one of the specifically invoked provisions. The Aroostook Band posits that if Congress had intended § 1725(a) to apply to it as well, then ABMSA would have said so. Otherwise, the Aroostook Band reasons, the specific inclusions in §§ 6(b) and 8(a) would be "meaningless surplusage."[24]

At its core, this is an argument about congressional intent, and it is one that we reject. Courts rarely presume that a statute's failure to invoke a prior statute will reflect an intent to repeal, *see Morton*, 417 U.S. at 549-50, although in an appropriate case this rule can be overcome by the Indian canons of construction, *see, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). In

any event, ABMSA's failure to reference MICSA's § 1725(a), or to repeat that section's language, is easily explained: Congress likely saw no need to do so in light of both MICSA and the state Micmac Act. ABMSA clearly contemplates that the state Micmac Act will have effect. *See* ABMSA § 6(d) (consenting to amendments to that law). And the state Micmac Act contains language nearly identical to MICSA's § 1725(a).[25] The Aroostook Band's reading is implausible.

There is another possible explanation for the failure to reference § 1725(a), but it is also detrimental to the Aroostook Band's argument. The two ABMSA provisions that the Aroostook Band cites for their explicit references to MICSA, §§ 6(b) and 8(a), do not deal with the application of *Maine* law. Instead, both deal with the application of *federal* law. That ABMSA did not specifically repeat § 1725(a) may simply reflect this differing subject matter.

2. *ABMSA as a Repeal of MICSA: The Dissent's Position*

Our dissenting colleague offers a different interpretation of ABMSA. The dissent does not argue that there are provisions in ABMSA that *affirmatively* grant the Aroostook Band sovereign powers. Nor does the dissent dispute our pre-ABMSA reading of MICSA. The dissent even accepts that the Congress that enacted MICSA, the Congress that enacted ABMSA, and the Maine Legislature, never intended to give the Aroostook Band even the relatively narrow protections from state law that the tribe now claims. Nonetheless, the dissent interprets ABMSA to yield the paradoxical conclusion that ABMSA accidentally restored full

sovereign rights to the Aroostook Band -- making it the sole Maine tribe with such extensive independence from state law. We decline to reach a result that we can be fully confident Congress did not intend. *Cf. Griffin v. Oceanic Contractors*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available.").

To reach its paradoxical result, the dissent offers the following syllogism. First, the dissent contends that ABMSA essentially repealed MICSA insofar as MICSA dealt with the relationship between Maine law and the Aroostook Band. This is because, in the dissent's view, Congress intended for the state Micmac Act to deal with the issue. Second, the dissent contends that the state Micmac Act never became effective as a matter of state law, due to irregularities in its passage. Third, the dissent argues that despite Congress's allegedly very strong intent for the state Micmac Act to govern this issue, Congress's intent was apparently not quite strong enough for it to have succeeded in ratifying the relevant portions of the state Micmac Act into federal law. Finally, faced with an apparent legal void on the issue, the dissent concludes that the "default option" must necessarily be the full scope of federal Indian common law.

This view of ABMSA diverges significantly from the interpretation offered by the Aroostook Band. Indeed, the dissent goes far beyond the position that the Aroostook Band advocates.[26]

In any event, we disagree with the dissent's view that

ABMSA supplanted MICSA's § 1725(a) insofar as that MICSA provision applied Maine law to the Aroostook Band. Although the dissent acknowledges that we must attempt to construe MICSA and ABMSA consistently unless Congress has clearly expressed otherwise, *see Morton*, 417 U.S. at 551, the dissent nevertheless concludes that ABMSA effects a repeal of the relevant part of MICSA by "explicitly deferring to [the state Micmac Act] on the issue of state jurisdiction." *Post*, at 59.

The dissent first points out that Congress did not simply amend MICSA to add the Aroostook Band, but rather enacted a separate statute. Yet that can hardly carry significant weight -- the fact that Congress enacted a separate statute is the whole reason why we must apply cases like *Morton* and the statutory canons that deal with the effect of a later statute on an earlier one. *See, e.g., Morton*, 417 U.S. at 537 (seeking to determine the effect of a later-enacted statute on a separate earlier-enacted one).

The dissent also finds persuasive the fact that ABMSA §§ 6(b) and 8 specifically reference MICSA, and the dissent concludes that the rest of MICSA must have been intentionally omitted. Yet as we explained above, the fact that ABMSA did not explicitly invoke MICSA's § 1725(a) may well have been because the state Micmac Act contained nearly identical language.

The dissent seizes on this, contending that it demonstrates Congress's belief that § 1725(a) was no longer pertinent. But the dissent's conclusion is too hasty. There is no reason to believe that Congress intended to repeal § 1725(a) *insofar as it provided a*

default rule in the event that the state Micmac Act were ineffective for some reason.[27]

Perhaps in recognition of this distinction, the dissent acknowledges that our position would have significant force if MICSA and the state Micmac Act contained identical jurisdictional provisions. Yet the dissent argues that they are not the same because while MICSA's § 1725(d)(1) contains a "sue and be sued" provision, the state Micmac Act does not. Notably, the dissent does not contend that MICSA's § 1725(a) is meaningfully different from its sister provision in the state Micmac Act. Of course, it is § 1725(a), and not § 1725(d)(1), that applies state law to the Aroostook Band in the ways relevant to this appeal.

Furthermore, the dissent's position is internally inconsistent. The dissent concludes that ABMSA "does not directly refer to the State's jurisdiction." *Post* at 67. Yet it also finds that Congress displaced MICSA's allocation of jurisdiction with the state Micmac Act. Because (in the dissent's view) the state Micmac Act was not effective, the dissent assumes that Congress must have preferred a void in the law over a reinstatement of MICSA's acknowledgment of state jurisdiction in disputes such as this.

Even if ABMSA had supplanted MICSA in favor of the state Micmac Act, the correct conclusion would be that ABMSA had simultaneously ratified the relevant provision of that act into federal law. *Cf. Mattingly v. District of Columbia*, 97 U.S. 687, 690, 24 L. Ed. 1098 (1878) (explaining that Congress can ratify earlier proceedings, notwithstanding the fact that the earlier proceedings were procedurally irregular, "if the

irregularity consists in the . . . mode or manner of doing some act . . . which [Congress] might have made immaterial by prior law").

Thus, notwithstanding the dissent's arguments, we believe that MICSA's § 1725(a) continues to govern the relationship between Maine law and the Aroostook Band. And even if it did not, we would conclude that a virtually identical provision in the state Micmac Act, Me. Rev. Stat. Ann. tit. 30, § 7203, had been ratified into federal law with similar effect. Under either scenario, the Aroostook Band is subject to the state laws at issue in this appeal.

3. *ABMSA and the Status of the Houlton Band*

A final set of arguments about ABMSA, and its interplay with MICSA, comes from the Houlton Band as amicus curiae. These arguments are also without merit.

First, amicus notes that while MICSA's § 1725(a) subjects Maine tribes to state law, that provision also contains exceptions for §§ 1724(d)(4) and 1727(e). Amicus reads those two provisions as "authoriz[ing] the State and the [Houlton] Band to separately negotiate jurisdictional and other terms." Amicus adds that because these exceptions are introduced by the language "[e]xcept as provided in," rather than the word "notwithstanding," Congress failed to express an intent to generally subject the Houlton Band to state law. The further inference we are apparently supposed to make is that ABMSA has a similar intent (or lack thereof) regarding the Aroostook Band.

This argument is misguided. Whatever the difference between the phrases "except as provided in" and "notwithstanding," it does not bear the weight amicus assigns. By using "except as provided in," Congress clearly expressed its view in MICSA that state law will apply to Maine tribes unless one of the two exceptions applies. These two statutory exceptions have nothing to do with the application of state law in this case. One, § 1727(e), pertains solely to child welfare matters. The other, § 1724(d)(4), is clearly limited to arrangements for Houlton Band land acquisition, and the tax consequences that will flow from that.

Second, amicus argues from MICSA's § 1725(e)(2), which provides:

Notwithstanding the provisions of [§ 1725(a)], the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.Amicus reasons from this that Congress wanted Maine and the Houlton Band to form their own agreement regarding Maine's jurisdiction, and thus Congress did not intend MICSA to contravene the Houlton Band's sovereignty (with the inference, again, that Congress intended a similar effect for the Aroostook Band in ABMSA).

Amicus misses the mark. While Congress contemplated the state and Houlton Band negotiating over certain matters, it also clearly set the baseline from which that negotiation would proceed. Indeed, § 1725(e)(2) clearly states that any negotiated agreement would be an *exception* to § 1725(a). Since there is no pertinent

agreement here, § 1725(a) controls, and the Houlton Band's sovereignty has been abrogated (with the further implication that any inferential argument applicable to the Aroostook Band would be foreclosed).

V. OTHER ARGUMENTS

In the previous sections, we concluded that MICSA subjects the Aroostook Band to claims of employment discrimination under state law, and that this is not altered by ABMSA. The Aroostook Band argues that even if this is so, there are two other reasons why we should uphold the magistrate judge's decision. We reject both reasons.

First, the Aroostook Band argues that its sovereign immunity protects it from the jurisdiction of the Maine courts, even if the Aroostook Band is in fact subject to substantive Maine law. But the language of § 1725(a) clearly subjects the Aroostook Band to not only the civil and criminal jurisdiction of "the State," but also the jurisdiction of its courts. Also, the Aroostook Band's argument relies on a distinction between inherent sovereignty and sovereign immunity that this court has rejected. *See Narragansett*, 449 F.3d at 24-25.

The Aroostook Band next contends that this court must engage in *Bracker* preemption analysis. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). When it applies, *Bracker* analysis has two parts: state law may be preempted either because of the application of federal law, or because of inherent tribal sovereignty. *See* id. at 142-43; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34, 103 S. Ct. 2378, 76 L. Ed. 2d 611 &

n.16 , 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). But *Bracker* analysis does not apply in cases where a federal settlement act applies state law to a tribe. *See Narragansett*, 449 F.3d at 22-23.[28]

VI. CONCLUSION

The parties have not challenged the magistrate judge's finding that the Aroostook Band is exempt from Title VII, and we do not disturb that conclusion. In all other respects, we reverse the magistrate judge's decision.

The magistrate judge did not rule on several of the Aroostook Band's alternative claims for relief: count 2, regarding sovereign immunity, count 4, regarding Title VII preemption, and count 5, regarding interpretations of state employment law. But the sovereign immunity claim was briefed to us as an alternative ground for affirmance, we have rejected it, and it is now foreclosed. The other two claims -- Title VII preemption of state law and the state law interpretive question based on pendent jurisdiction[29] -- are remanded.

The judgment is *reversed* and *remanded*. Costs are awarded to the defendants-appellants.

-Dissenting opinion follows-

DISSENT BY: LIPEZ

DISSENT

LIPEZ, *Circuit Judge*, dissenting. The majority considers at length whether the Maine Indian Claims Settlement Act ("MICSA") authorizes the State to

enforce its employment discrimination laws against the Aroostook Band of Micmacs and concludes that it does. In my view, however, MICSA no longer governs the relationship between the Band and the State. Instead, the federal Aroostook Band of Micmacs Settlement Act ("ABMSA") replaced MICSA in 1991 as the federal law governing the Band's status, including its relationship with the State of Maine.

I recognize that all relevant parties - Congress, the State and the Band - assumed that ABMSA's passage would leave the Band subject to Maine law. ABMSA, however, relied solely on the State's Micmac Settlement Act ("MSA") to establish Maine's jurisdiction over the Band.[30] That reliance makes the effectiveness of the state statute critical to the outcome of this case. I agree with the magistrate judge that, with at least one prerequisite unmet, MSA was never validly enacted, and the jurisdiction asserted by Maine and anticipated by Congress never took effect. Consequently, I conclude that the Band is not subject to the Maine employment discrimination laws at issue in this case. Respectfully, therefore, I dissent.

I.

The majority's discussion of "The Status of the Aroostook Band under ABMSA" is devoted primarily to addressing, and rejecting, potential conflicts between MICSA and ABMSA. My colleagues specifically consider whether ABMSA's provisions on federal recognition and self-government, §§ 6(a) and 7(a), conflict with, and thus exempt the Band from, the MICSA provision subjecting all Maine tribes to state law, 25 U.S.C. § 1725(a). Their discussion of potential

conflicts is, however, beside the point because § 1725(a) no longer applies to the Micmacs. I agree with the Band that, except where otherwise stated in ABMSA, that act supplants MICSA with respect to the Micmacs' status. ABMSA was enacted to replace MICSA on all matters for which the Band should have received individualized recognition in the earlier statute - as did the Passamaquoddys, the Penobscots and the Maliseets. In effect, Congress retrieved the Micmacs from the MICSA catch-all provisions that applied to "all other tribes or bands of Indians" and, in a detailed and comprehensive enactment, defined the Micmacs' new status as the fourth Maine tribe to be recognized and compensated for the loss of their aboriginal holdings.

I recognize the canon of statutory construction, cited by the majority, that two statutes capable of co-existence must both be regarded as effective, "absent a clearly expressed congressional intention to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see also United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 10 (1st Cir. 2005) ("Inconsistency between . . . two statutes . . . is not enough: 'where two seemingly inconsistent acts can reasonably stand together, a court must interpret them in a manner which gives harmonious operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary.'") (citations omitted). The issue, however, is not whether the two statutes may co-exist - I agree that they may - but what effect ABMSA had on MICSA's applicability to the Micmacs.

In my view, it is apparent that ABMSA replaces the general "all other tribes" approach of MICSA, as it may

have applied to the Band, with a specific statute premised on federal recognition of the Band. In its coverage of subjects addressed in MICSA, this separate statutory settlement with the Micmacs parallels MICSA's settlement with the other named tribes. In fact, Congress included language in ABMSA reflecting such an intent. In ABMSA's "Findings and policy" section, Congress observed that "[t]he Band was *not referred to* in [MICSA]" because its historical presence in Maine had not yet been documented, § 2(a)(2) (emphasis added), and further stated that "[i]t is now fair and just to afford the [Micmacs] the same settlement provided to the [Maliseets] . . . *to the extent they would have benefitted from inclusion in the Maine Indian Claims Settlement Act of 1980*," § 2(a)(5) (emphasis added). Congress thus enacted ABMSA because, after closer scrutiny of the Band's history, lawmakers saw the need to redress the Band's omission from MICSA as a federally recognized tribe.

Despite an expressed intent to afford the Band the same settlement as the Maliseets, it is telling that Congress did not simply amend MICSA to extend like terms to the Micmacs. Rather, Congress specified in ABMSA's provisions various entitlements for the Band, including a $ 900,000 land acquisition fund, *see* § 4(a), federal recognition, *see* § 6(a), and the right to "organize for its common welfare," *see* § 7(a). ABMSA also contains provisions that parallel MICSA's on the Band's eligibility for financial benefits and for special services from the federal government. *Compare* ABMSA §§ 6(a), (c) *with* 25 U.S.C. § 1725(i).

In addition, as the majority acknowledges, ABMSA explicitly incorporated MICSA provisions governing

the applicability of federal law, *see* § 6(b), and implementation of the Indian Child Welfare Act, *see* § 8.[31] If MICSA continued to apply to the Micmacs independently of such references in ABMSA, there would be no need for ABMSA to explicitly incorporate particular MICSA provisions. The majority offers an explanation for the overlap with respect to § 8 - observing that it clarifies the applicability of the Indian Child Welfare Act in Maine - but does not explain the need to adopt MICSA's terms for the applicability of federal law in § 6(b). In my view, the reason for both is the same: where Congress wanted MICSA's provisions to continue to apply to the Micmacs, it knew that it had to say so explicitly because ABMSA replaced MICSA with respect to the Band. Congress also took this approach with MICSA's universal extinguishment of claims of aboriginal title to Maine lands, explicitly recognizing that the Band remained bound by that portion of the earlier statute. *See* ABMSA § 2(a)(3) (noting that the Micmacs "could have asserted aboriginal title" to lands in Maine "but for the extinguishment of all such claims by the Maine Indian Claims Settlement Act of 1980").

The specificity and completeness of ABMSA are persuasive evidence that the Act was clearly intended by Congress as a comparable, but independent, statement of the benefits and limitations applicable to the Band. The majority wrongly dismisses the Band's argument that ABMSA's reference to particular MICSA provisions, and not others, is significant, *see supra* pp. 41-42 (observing that the lack of reference to MICSA's § 1725(a) - the section imposing state jurisdiction on the tribes - is "easily explained" because ABMSA "clearly contemplates that the state Micmac

Act will have effect," and the state act "contains language nearly identical to MICSA's § 1725(a)"). That, of course, is precisely my point: in fully addressing the status of the Micmacs in ABMSA, Congress intended and expected that state jurisdiction over the Band would be accomplished by means of the state Micmac Act. Section 1725(a) was not mentioned because it was no longer pertinent; as with all other facets of the Micmacs' status, Congress enacted a new, specific provision to govern the Band's relationship with the State.

The majority misses the larger context when it briefly rejects the notion that ABMSA impliedly repealed § 1725(a). As my discussion shows, the issue here is not whether MICSA or any of its particular provisions were repealed through ABMSA. They were not. Rather, as the Band has argued, ABMSA simply rendered MICSA inapplicable to the Micmacs - except where specifically incorporated.[32] Moreover, even if we viewed this case from the perspective of implied repeal, the all-embracing nature of ABMSA would meet the standard to show Congressional intent to "repeal" MICSA insofar as it applied to the Micmacs. *Cf. Posadas v. Nat'l City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936) ("[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."); *Lahey Clinic Hosp.*, 399 F.3d at 10 (noting that implied repeal of a federal statute may be shown if, "by clear and manifest intent," a later act "covers the whole subject matter area and was meant as a substitute") (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)); *Granite State Chapter, Assoc. of Civilian*

Technicians v. Fed. Labor Relations Auth., 173 F.3d 25, 27 (1st Cir. 1999) ("If one Congress clearly and manifestly makes known its intent to supplant an existing law, a court can find repeal by implication."). That the progression from MICSA to ABMSA is from a general statute to a specific one lends additional support to the view that AMBSA effectively "repealed" MICSA with respect to the Band. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (noting the "strong presumption against repeals by implication, . . . especially an implied repeal of a specific statute by a general one") (citations omitted).

Congress's intention to replace MICSA with ABMSA for the Micmacs is evident in ABMSA's approach to the issue of state jurisdiction over the Band. ABMSA neither invokes MICSA nor in its own terms subjects the Band to state law. Instead, it states as an express purpose the ratification of "the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs." § 2(b)(4). By explicitly deferring to MSA on the issue of state jurisdiction without any reference to MICSA, ABMSA states, in effect, that MICSA is no longer the governing law on the Micmacs' relationship with the State.[31]

The view of the majority that MICSA could be reactivated as a default, imposing state law on the Micmacs in the face of any statutory gap that may have occurred because of the failed enactment of MSA, might be more persuasive if MICSA and MSA contained identical jurisdictional provisions. In such circumstances, one could more plausibly argue that ABMSA was intended to reaffirm an ongoing

relationship, first defined by MICSA. MICSA, however, included two separate provisions establishing the State's authority over its resident tribes. *See* 25 U.S.C. § 1725(a), (d)(1). MSA did not include the second of these - the "sue and be sued" provision that typically is used to signify a waiver of immunity from suit. *See, e.g., Gomez-Perez v. Potter*, 476 F.3d 54, 57 (1st Cir. 2007). Whether or not that omission is significant on the question of sovereign immunity, it is a further indication that ABMSA was a distinct and independent enactment that replaced MICSA with respect to the Micmacs. To resurrect statutory provisions from MICSA when Congress in ABMSA effected (through attempted ratification of MSA) a different governing framework for the Band's relationship with the State is unsupportable - and inconsistent with "a clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551.

My view that ABMSA replaced MICSA as the federal law governing the Band's status and defining the Micmac-Maine relationship - and that MICSA therefore may not be invoked as a default - is reinforced by comments from every member of Maine's Congressional delegation at the time of ABMSA's passage. In urging a favorable vote on the statute, then-Senators Cohen and Mitchell and then-Representatives Andrews and Snowe all emphasized the need for the new legislation because of the Micmacs' "omission from the 1980 Maine Indian Claims Settlement Act." 137 Cong. Rec. H9,652, 9,655 (1991); *see also* 137 Cong. Rec. S13,360, 13,362 (1991). Among other comments, Senator Mitchell observed:

The Micmacs' exclusion from the 1980 Maine Indian Claims Settlement Act *left them in a unique situation*, where they have no State Indian assistance and are ineligible for Federal assistance. The bill the Senate is considering today will establish the historical presence of the Micmacs in Maine and provide Federal recognition to the band.137 Cong. Rec. at S13,362 (emphasis added).

Senator Cohen assured his colleagues that "[t]he bill does not amend the 1980 act, and we do not intend that any of the issues covered in that landmark legislation will be reopened or reconsidered." 137 Cong. Rec. at S13,362. In other words, Congress began with a clean slate in giving the Band - singularly excluded from MICSA - due recognition for its historical presence in Maine. To the extent that Congress wanted to draw on MICSA in drafting ABMSA, it cited the specific provisions of MICSA that it wished to incorporate into ABMSA.

ABMSA's conflicts provision, § 11, reflects this approach. The provision states: "In the event of a conflict of interpretation between the provisions of the Maine Implementing Act, the Micmac Settlement Act, or the Maine Indian Claims Settlement Act of 1980 . . . and this Act, the provisions of this Act shall govern." MICSA remained in effect, and Congress undoubtedly recognized that the general language in MICSA and the more specific language in ABMSA covered some of the same subject matter. It thus sought to ensure that any seeming conflicts between the two would be resolved by deferring to ABMSA's provisions - reinforcing ABMSA's preemptive effect on the matters it covered.[34]

In sum, every indicator points to a congressional intent to supplant MICSA for the Micmacs in all respects in which that earlier statute was not explicitly extended by ABMSA's terms. Thus, I can only conclude that, after passage of ABMSA, MICSA no longer controlled Maine's jurisdiction over the Aroostook Band of Micmacs.

II.

My conclusion that ABMSA, rather than MICSA, governs Maine's authority to impose its employment discrimination laws on the Band requires me to evaluate the Maine Micmac Act. ABMSA relied wholly on the state act to "define[] the relationship between the State of Maine and the Aroostook Band of Micmacs," § 2(b)(4), and I therefore must confront the Band's challenge to the validity of MSA. In a thoughtful and thorough discussion, the magistrate judge considered whether that statute may be deemed valid even though several statutory prerequisites to its effectiveness - including a requirement that it be certified by the Band within sixty days of the 1989 Legislature's adjournment - were not met.[35] *See Aroostook Band of Micmacs, 403 F. Supp. 2d at 118-22.* I agree with her assessment that it may not.[36]

The required certification cannot be cast aside as a mere technicality. Given the complex relationship between Maine and its tribes, it would be both injudicious and disrespectful to ignore an express requirement of consent contained in a settlement act.[37] Indeed, ABMSA and MSA carry the consent requirement through to future amendments regarding jurisdiction, *see* 30 Me. Rev. Stat. Ann. tit. 30, § 7201

(Historical and Statutory Note); ABMSA § 6(d). Therefore, on this jurisdictional issue in particular, securing the Band's formal agreement was deemed necessary.

As the magistrate judge pointed out, strict adherence to the consent procedure is consistent with a 1985 legal opinion from Maine's Attorney General concerning a similar certification requirement in the "Act Relating to the Time of Penobscot Nation Trust Land Acquisition." That act required the Penobscot Nation to submit written certification of its agreement with the act's provisions within sixty days of the legislature's adjournment. The tribe's certification was received two days late, and the Attorney General concluded that the only remedy was to reenact the legislation. He observed:

While this is unfortunate, I feel it is especially necessary to be strict in interpreting these provisions in that it deals with the question of land acquisition. Indeed, any other conclusion . . . could render a land transaction subject to legal challenge by third parties.Although MSA does not focus on the question of land acquisition, it is of comparable significance because the statute would diminish the Band's sovereign rights. *Cf., e.g., Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (noting that courts are obliged "to construe 'acts diminishing the sovereign rights of Indian tribes . . . strictly'") (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994)). Moreover, the Legislature added the certification requirement to MSA in the face of the Attorney General's previously issued opinion, with the presumptive understanding that a failure to meet it

could prevent the statute from taking effect. The formalities of legislative enactments often have substantive importance. In the context of Indian sovereignty, it would be particularly inappropriate to ignore an express statutory term protective of that sovereignty.

Indeed, while MSA's efficacy is technically an issue governed by Maine law, the limitation it purportedly imposes on the Band's sovereignty implicates federal concerns as well. States may not assert jurisdiction over tribes without congressional approval, *see Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g*, 476 U.S. 877, 891, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Fellencer*, 164 F.3d at 709 ("[O]nly Congress can abrogate or limit an Indian tribe's sovereignty."), and courts must remain sensitive to the federal interest even when sovereignty issues arise from state law. Noting that this is a "unique case and there is no controlling authority either way," appellants urge the court to find implied certification based on the Band's expressed support of MSA at the time of its enactment. On matters of Indian sovereignty, however, the magistrate judge is certainly correct that a court may not "finesse what is clearly the absence of a state legislative imposed precondition to the statute's valid enactment." 403 F. Supp. 2d at 121.

Moreover, as with the issue of land acquisition, compliance with the certification requirement could have reduced the risk of time-consuming and expensive future conflicts. If the Band's governing body had discussed and voted on the certification, tribal officials

would have had the opportunity to crystallize their expectations and clarify matters of concern, and the Band's formal commitment to the agreement would have protected the State from later claims that the Band objected to certain of its terms. Failure to obtain the Band's consent was not, as appellants argue, simply an "irregularity in the final execution of the agreement." To find implied consent would be to override the very purpose of a certification provision.

I also join the magistrate judge in rejecting the notion that Congress's expression of purpose to ratify MSA effectively validated the statute - or served to incorporate its substantive provisions into federal law. Unlike MICSA, which affirmatively states that the tribes shall be "subject to the civil and criminal jurisdiction of the State," 25 U.S.C. § 1725(a), or, in the case of the Passamaquoddy Tribe and Penobscot Nation, "subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act," *id.* § 25 U.S.C. 1725(b)(1), ABMSA does not directly refer to the State's jurisdiction. Instead, it defers to state law to "define[] the relationship between the State of Maine and the Aroostook Band of Micmacs."[38] The silence in the federal statute, in light of Congress's otherwise comprehensive treatment of the Band's status, reflects a lack of affirmative intent on the issue. From all that appears, Congress was content in 1991 to leave the relationship between the Band and the State to Maine law. While Congress unquestionably anticipated a limitation on the Band's sovereignty through MSA, it would be reading beyond the text to construe the purpose provision to mandate such a limitation. I see no basis for invigorating a state statutory enactment that

fails as a matter of state law, and which Congress has not replicated as a discrete statutory provision within ABMSA.

It has now been nearly ten years since the certification problem surfaced, casting doubt on the validity of MSA and its assertion of state jurisdiction over the Band. In the well stated words of the magistrate judge: "There is no doubt that Congress did (and still does) have the power to enact federal legislation which, despite the lack of an effective state law, included the terms of that legislation in the federal act[,] making those terms federal law." 403 F. Supp. 2d at 122. Congress has so far not chosen to act, and the courts are not at liberty to fill the gap.[39]

III.

I recognize that my conclusions about ABMSA and MSA lead to an anomalous result - the Micmacs are the sole Maine tribe *not* subject to some level of state jurisdiction. But courts may not ignore established principles of statutory construction or the canons of Indian law to avoid uncomfortable outcomes. The failure of MSA to take effect means that the Micmacs were left with the sovereign rights they otherwise would hold as a recognized Indian tribe under ABMSA. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 62 (1st Cir. 2005) ("A tribe retains those aspects of sovereignty that have not been 'withdrawn by treaty or statute, or by implication as a necessary result of [the tribe's] dependent status.'") (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)) (alteration in original), *overruled on other grounds by Narragansett Indian Tribe v. Rhode*

Island, 449 F.3d 16 (1st Cir. 2006) (en banc)[40]; *Fellencer*, 164 F.3d at 709. Although that outcome is not what Congress anticipated,[41] it is nonetheless the inevitable result of the choice Congress made to explicitly rely on the state Micmac Act to frame the Maine-Micmac relationship.[42]

Our prior case law establishes that the sovereign rights retained by the Band foreclose application of the state's employment discrimination laws to the Micmacs. *Cf. Fellencer*, 164 F.3d at 711-13 (rejecting employment discrimination claim against the Penobscot Nation, relying, *inter alia*, on "'the longstanding federal policy of providing a unique legal status to the Indians in matters of tribal employment'") (quoting *Morton v. Mancari*, 417 U.S. 535, 548, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). I would therefore affirm the judgment of the magistrate judge.

Footnotes

[1]There are only small exceptions pertaining to child welfare matters, *see* 25 U.S.C. § 1727(e), and land acquisition, *see id.* § 1724(d)(4), and the exceptions are not pertinent here, as we discuss later.

[2]During committee discussions in the Maine legislature, members of the Aroostook Band spoke in favor of passage of the state Micmac Act. After committee deliberations, and after discussions between the Aroostook Band and the state had ended, the Maine legislature amended the pending Micmac bill to add an effectiveness provision. That provision stated that the Micmac Act would only be effective if certain contingencies were met; one of these contingencies was a requirement that the Aroostook Band formally certify

its agreement with the act within 60 days of the legislature's adjournment. *See* 1989 Me. Laws 230, 232. The Aroostook Band was apparently unaware that this requirement had been added, and it never submitted the certification. The other contingencies for effectiveness, which required that ABMSA be enacted with certain provisions, also may not have been fulfilled.

[3]Gardiner's and Condon's claims are now the subject of related litigation in the Maine state courts. That litigation has apparently been stayed pending the outcome of this suit. *See Aroostook II*, 404 F.3d at 52.
[4]The complaint treated tribal sovereign immunity as a concept distinct from inherent sovereignty. As we discuss later in the opinion, our case law has now rejected this distinction.

[5]In light of her resolution, the magistrate judge did not reach the merits of most of the Aroostook Band's remaining claims. She dismissed the Band's claims based on tribal sovereign immunity, Title VII preemption, and interpretation of the MHRA and MWPA, as any relief on those claims would have been identical to the relief already granted. *Aroostook III*, 403 F. Supp. 2d at 133. The magistrate judge did enter judgment for the Aroostook Band on its third claim, which contended that the Band was exempt from Title VII. *Id.* at 130-31, 133. The merits of that claim were not contested, and are not a subject of this appeal.

[6]Maine does acknowledge the possibility that MICSA and ABMSA did not fully abrogate the Aroostook Band's sovereignty as to all matters -- it contends, however, that the issues in this case cannot fall within

the limited exception. The State's acknowledgment is only that ABMSA § 7(a) may give the Aroostook Band independence over aspects of its own governmental and electoral structures. *Cf. Narragansett*, 449 F.3d at 26 (finding congressional abrogation of a tribe's sovereignty, but recognizing the possibility that the tribe still retained control over a "core group of sovereign functions").

[7]The State also relies on a separate MICSA provision, *see* 25 U.S.C. § 1725(h), to argue that the federal common law doctrine of tribal sovereignty no longer has force anywhere within the State of Maine. We do not reach this argument.

[8]The Aroostook Band argues that its employment of defendants Gardiner, Condon, and Ayoob was an "internal tribal matter." For purposes of this decision, we assume that to be true for the sake of argument.

In *Penobscot Nation* v. *Fellencer*, this court determined that a tribe's employment of a community health nurse, who tended to the personal medical needs of tribal members, was an "internal tribal matter" within the meaning of the Settlement Acts. *See* 164 F.3d at 707. Because it has not been contested, we accept arguendo the extension of *Fellencer* to this case. We do note that unlike in *Fellencer*, *see id.* at 710, Maine has here claimed an interest in the enforcement of its employment laws.

[9]Although this portion of *Narragansett* was referring to "sovereign immunity" rather than "inherent sovereignty," elsewhere in that en banc opinion we rejected the idea that there was a meaningful distinction between the two, and we explicitly

overruled *Aroostook II* to the extent it held otherwise. *See Narragansett*, 449 F.3d at 24-25.

[10]Indeed, it appears that it was the Aroostook Band as a legal entity that employed defendants Gardiner, Condon, and Ayoob. Both sides admitted in the district court that "the Band" employed the three individual defendants.

Additionally, as defendants Gardiner and Condon point out, the plaintiff in this lawsuit is the "Aroostook Band of Micmacs," which the complaint tells us is governed by the "Aroostook Band of Micmacs Tribal Council." All relief is requested on behalf of "the Band." If only the Band as "polity" is the plaintiff, and it is requesting relief only on behalf of itself, one wonders whether the plaintiff even has standing to advance claims on behalf of the Band as "government."

[11]While we are not obligated to consider points raised only by an amicus, *see North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 556 n.8 (1st Cir. 1991), we nonetheless consider this and other points, in part because we have the benefit of the state's responses.

[12]*Fellencer* is the only cited case from this jurisdiction and it hardly helps the Aroostook Band. That decision, which involved a former employee of the Penobscot Nation, merely interprets the "internal tribal matters" exception explicitly contained in the state and federal settlement acts. *Fellencer*, 164 F.3d at 707. *Fellencer* concluded that the exception applied on its facts, insulating the contested employment decision from Maine law. *Id.* at 713. No one doubts that the "internal tribal matters" exception applies to the Penobscots; the

question is whether it also applies to the Aroostook Band.

[13]The Aroostook Band does cite one case that is more on point. *See Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340, 71 Cal.Rptr.2d 105 (Cal. Ct. App. 1998). But *Middletown* merely interprets the same statute, Public Law 280, which the Supreme Court dealt with in *Bryan*. *See id.* at 112 (holding that *Bryan*'s interpretation controlled the outcome). We distinguished *Bryan* and Public Law 280 above, noting in particular the fact that Public Law 280 does not specifically apply state law to the tribes themselves.

[14]Maine's highest court has expressed a similar understanding. *See Penobscot Nation v. Stilphen*, 461 A.2d 478, 488-89 (Me. 1983).

[15]The Houlton Band, as amicus curiae, attempts to salvage the interpretation offered by the Aroostook Band. It contends that the Passamaquoddy Tribe and the Penobscot Nation received the less generous "internal tribal matters" exception, while all other Maine tribes retained the full extent of their inherent sovereignty. This radical interpretation finds little textual support, and is drastically at odds with the legislative history.

[16]The Aroostook Band does not argue that, in 1980, the drafters of either settlement act intended to give the Aroostook Band more favorable terms than what the Houlton Band was given.

[17] ABMSA § 6(a) states:

Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible

to receive all of the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.

[18]Nor is Maine the only state where Congress has made federal recognition consistent with limits on sovereignty. The Narragansett Indian Tribe is a federally recognized tribe, and it too has had aspects of its sovereignty abrogated by a similar settlement. *See Narragansett*, 449 F.3d at 19, 25-27.

[19]Citing MICSA's Senate Report, amicus argues that "recognition" in MICSA actually does have the same meaning as what the Aroostook Band attributes to ABMSA § 6(a). That Senate report comments on the state Settlement Act's stated purpose to "wholly subject" the Houlton Band of Maliseet Indians and its lands to "the laws of the State," Me. Rev. Stat. Ann. tit. 30, § 6202. *See* S. Rep. No. 96-957, at 35 (1980). The report states that § 6202 differs from MICSA in that the latter "will extend Federal recognition to the Maliseets . . .[, and] will provide that Maliseet land must also be taken in trust . . . which will entail exemptions from some state laws." *Id.*

This legislative history does little to advance amicus's position. First, the report is silent as to any conflict between MICSA's § 1725(a) and federal recognition, and it is § 1725(a) that subjects tribes like the Houlton Band and Aroostook Band to Maine law. Second, even if federal recognition is inconsistent with "wholly" subjecting the Houlton Band to state law, it is another question entirely how far any exemption goes. Under Maine's interpretation of MICSA, the Houlton Band

may still retain sovereignty over certain key decisions regarding the structure of its government and its electoral process.

[20]In passing ABMSA, Congress plainly did not intend to give the Aroostook Band greater benefits than it had given the Houlton Band in MICSA. As one of its stated purposes, ABMSA declares that "[i]t is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefitted from inclusion in [MICSA]." ABMSA § 2(a)(5); *see also id.* § 2(a)(4) ("The Aroostook Band . . . is similar to the Houlton Band . . . and would have received similar treatment under [MICSA] if the [historical] information available today had been available . . . [in 1980]"). ABMSA's Senate committee report reinforces that view. *See* S. Rep. No. 102-136, at 1 (1991) ("The bill will extend to the Aroostook Band . . . the same compensation, rights and benefits as were provided to the Houlton Band . . . in [MICSA]"). Indeed, ABMSA authorizes a $ 900,000 appropriation for Aroostook land acquisition, *see* ABMSA §§ 4(a), 10, the same amount that MICSA authorized for Houlton land acquisition. And despite the Aroostook Band's suggestions otherwise, nothing in *Aroostook II* contradicts our conclusion that similar treatment was envisioned.

[21]The Aroostook Band points us to the IRS's determination that the tribe exercises "governmental functions" for the purposes of certain provisions in the Internal Revenue Code. *See* Rev. Proc. 2002-64, 2002-2 C.B. 717. This is wholly beside the point, and offers no assistance in our interpretation of ABMSA.

[22]Amicus points to other bits of legislative history, but they do not provide the needed support for the Aroostook Band's arguments. Amicus cites Secretary Andrus's testimony that his proposal would "clarify the jurisdictional relationships and . . . *provide for viable tribal governments in the future.*" *MICSA Senate Hearings* at 38 (statement of Secretary Andrus) (emphasis added). Yet context shows that this statement was made in regard to the confusion surrounding the municipal status of the Passamaquoddy and the Penobscots. It does not appear that the statement was intended to apply to other tribes. In any event, the reference to "viability" seems to refer merely to ensuring the tribe has a clear, written, source of governing authority. There is no indication it has a broader meaning.

[23]This omission is glaring because the Aroostook Band asserts that § 1726(a) took language with "well-established meaning" in the IRA. In fact, a leading casebook seems to suggest that the meaning of § 16 is very much in doubt. *See* Getches et al., *Cases and Materials on Federal Indian Law* 196 (5th ed. 2005) (noting the paucity of litigation about the IRA's terms); *see also id.* (wondering whether § 16 actually grants tribes any substantive powers).

[24]It is a significant overstatement to claim that § 8(a)'s reference to MICSA would be "meaningless surplusage" under Maine's reading of the relevant statutes. The first part of § 8(a) includes the Aroostook Band in the Indian Child Welfare Act, a federal statute. Without clarification, this part of § 8(a) would raise a real question whether the Indian Child Welfare Act continues to have force in Maine. *See* 25 U.S.C. § 1725(h) (making federal laws inapplicable in Maine if

they give Indians special benefits and they "affect[] or preempt[]" Maine's jurisdiction). Thus the second half of § 8(a) plainly adds a needed proviso: "nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by [MICSA]."

[25]*Compare* Me. Rev. Stat. Ann. tit 30, § 7203 ("[T]he Aroostook Band of Micmacs and all members . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . ."), *with* 25 U.S.C. § 1725(a) ("[All Maine tribes and Indians], other than the Passamaquoddy Tribe, the Penobscot Nation, and their members . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person . . . .").

[26]The Aroostook Band's implied repeal argument was made only to advance its claim that certain provisions of ABMSA provide affirmative grants of sovereignty. *See* Principal Br. for the Appellee at 54-56. Indeed, the portion of the brief cited by the dissent was taken from a section titled "ABMSA §§ 6(a) and 7(a) Conflict Sharply with MICSA." *See id.* at 54. Although we disagree with the Aroostook Band's interpretation of ABMSA §§ 6(a) and 7(a), we acknowledge its attempt to advance a view of the statutory scheme that it simultaneously claims was intended by Congress. Amicus also does not present the dissent's interpretation.

[27]Indeed, the dissent's position essentially conceives of ABMSA as containing an (unwritten) clause that repeals part of § 1725(a) in favor of the state Micmac Act. *See post*, at 59 ("By explicitly deferring to [the state Micmac Act] . . . ABMSA states, in effect, that MICSA is no longer the governing law on the Micmacs' relationship with the State."). But can such a "clause" continue to be valid if it were later determined that the state Micmac Act never became law?

That scenario resembles situations in which a new statute arguably repeals an earlier statute, but the new statute is ultimately found unconstitutional. As the Sixth Circuit has recognized, it is well established that an invalid statute "does not repeal a prior statute on the subject when a contrary construction would create a void in the law which the legislative body did not intend. The prior statute is 'revived' to avoid a chaotic hiatus in the law." *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 261 (6th Cir. 1983). Although our situation is not perfectly analogous, similar principles counsel avoiding an interpretation that would lead to an unintended "void in the law."

[28]*Narragansett*'s holding regarding *Bracker* is properly applied to this fact pattern. Settlement act cases like this one involve a federal statute that clearly subjects a tribe to state law by abrogating that tribe's inherent sovereignty. It would be inconsistent to nevertheless conclude, under *Bracker*, either that federal law wishes a different result than a statute's plain meaning, or that a tribe's sovereignty continues in force despite abrogation. Saying that *Bracker* is inapplicable in a case like this is merely a shorthand way of saying that a federal statute has already balanced the competing factors.

[29]The magistrate judge did not decide whether to exercise pendent jurisdiction over count 5, *see Aroostook III*, 403 F. Supp. 2d at 132, and we express no opinion on that issue.

[30]ABMSA § 2(b) provides, in relevant part: "It is the purpose of this Act to - (4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs."

[31]Section 6(b), which is labeled "Application of Federal law," states: "For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of [MICSA]." Section 8, which is labeled "Implementation of the Indian Child Welfare Act," provides:

For the purposes of this section, the Band is an 'Indian tribe' within the meaning of section 4(8) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(8)), except that nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by [MICSA].

[32]The majority asserts that my view that AMBSA wholly supplants MICSA was not argued by the Band. That is not so. In its brief, the Band argued that "[u]nder well-settled rules of construction, MICSA provisions may apply to the Band only as provided in ABMSA." Br. at 55. The Band then goes on to discuss the two incorporated MICSA provisions noted by the majority:

For example, Congress enumerated in ABMSA § 8(a) that the MICSA Child Welfare provisions apply to the

Micmac. ABMSA § 6(b) provides that federal law will apply to the Band as it does to other Maine tribes in MICSA. If Congress intended that all or any other parts of MICSA would apply to the Band, then it would not have specified those it did and not the others. It is a "fundamental principle of statutory construction that the specific trumps the general." . . . Clearly, all of MICSA cannot apply to the Band without rendering the specific inclusions meaningless surplusage.*Id.* at 55-56. This position was also articulated by the Band at oral argument. In explaining the Micmacs' position in response to questions from the panel, counsel for the Band stated:

The 1980 law except where expressly . . . noted by Congress cannot apply to deny the Band its right to self-government. Congress created a wholly separate statute for the Micmac. . . . The 1991 Act, and only the 1991 Act, except where Congress noted . . . the 1980 Act would apply . . .At that point, a panel member asked: "So, the '91 Act basically eliminates the 1980 Act except where it expressly repeats?" Counsel replied: "Correct, your honor, that is our argument."

[33]The MSA jurisdiction provision states, in relevant part: "[T]he Aroostook Band of Micmacs and all members . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . ." Me. Rev. Stat. Ann. tit. 30, § 7203.

[34]The majority states that "[t]here is no reason to believe that Congress intended to repeal § 1725(a) *insofar as it provided a default rule* in the event that the state Micmac Act were ineffective for some reason." *See supra* p. 45 (emphasis in original). The majority

thus speculates that Congress would have invoked MICSA's jurisdictional provision as a default if it had anticipated the ineffectiveness of the state law. That speculation is improper for at least two reasons. First, as noted *infra*, it is not inevitable that Congress would have legislated a specific relationship for Maine and the Micmacs if the State itself failed to do so. Congress did not explicitly incorporate in ABMSA the substance of MSA, and it may have made a deliberate choice to allow the State to define its own jurisdictional relationship with the Band. Moreover, even if there were a basis for a presumed congressional intent to impose state jurisdiction on the Band comparable to that found in MICSA, that is no justification for rewriting ABMSA. Judgments about congressional intent must have some basis in the language of the relevant statute, even if that language is ambiguous. The majority would incorporate by judicial fiat a default provision that would read something like this: "If the Maine Settlement Act fails to take effect, the Micmacs shall be subject to the jurisdictional terms of MICSA § 1725(a)." There is not a hint of such language in ABMSA.

Elsewhere, my colleagues note that, even if Congress through ABMSA had substituted MSA for MICSA with respect to state jurisdiction over the Band, "the correct conclusion would be that ABMSA had simultaneously ratified the relevant provision of the act into federal law." This assertion reflects the same flawed judgment about Congress's intent. The statute that Congress passed does not by its own terms impose state jurisdiction on the Band. Consequently, ABMSA's purpose to ratify MSA may reflect only an intent to endorse whatever jurisdictional relationship Maine enacted into law, and not an intent to adopt a particular

Maine-Micmac relationship as a matter of federal law. Congress *could have* adopted the substance of MSA's jurisdictional provision by incorporating it into ABMSA (as MICSA incorporated the jurisdictional provisions of the Maine Implementing Act), but Congress did not do so.

[35]In the official codification, a note is appended to each section of MSA stating that the provision was added to the code "pending receipt of certification of agreement by Council of Aroostook Band of Micmacs." The notes following each subsection state that the act will become effective only if: (1) the United States enacts ratifying legislation that approves the act without modification; (2) the United States consents to amendments that would be made with the consent of the Aroostook Band of Micmacs; and (3) within sixty days of the Legislature's adjournment, the Secretary of State receives written certification from the tribal council that the Band has agreed to the act. It is undisputed that no certification was received by the Secretary of State.

[36]The majority opinion notes that whether the state Micmac Act became effective is a "difficult and complex issue of state law," and my colleagues are reluctant to decide it without guidance from the Maine Supreme Judicial Court. As I shall explain, the issue is neither complicated nor just a matter of state law.

[37]As noted by the majority, the certification provision and the other contingencies for effectiveness were added to the pending Micmac bill late in the legislative process. The Band did not learn of the certification requirement until 1997.

[38]As noted earlier, § 2(b) provided, in relevant part, that "It is the purpose of this Act to - (4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs."

[39]I fully agree with the magistrate judge that the lack of a severability provision in ABMSA does not mean that the entire statute must be held invalid based on MSA's ineffectiveness, which frustrated only one of ABMSA's purposes. Like her,

I am uncomfortable with the notion of reading an entire Congressional enactment out of existence, not because it is unconstitutional, but because one of its stated purposes has apparently failed. Congress can easily remedy that failure by adopting the terms of the [MSA] itself, if it chooses to do so.403 F. Supp. 2d at 123.

[40]*Narragansett* rejected the distinction drawn in *Aroostook Band of Micmacs* between tribal sovereignty and tribal sovereign immunity. *See* 449 F.3d at 24-25. [41]

With quotations from two cases, the majority suggests that my statutory interpretation is indefensible because it would produce "absurd results" or "'a chaotic hiatus in the law.'" I reject those characterizations. The restoration of Micmac sovereignty beyond what Congress had anticipated could hardly be called "absurd" and surely would not create "chaos."[42]

I am not alone in reaching this conclusion. The same view was expressed in a memorandum prepared by Philip N. Hogen, an Associate Solicitor for the Department of the Interior, in connection with Maine's application to administer the Maine Pollutant

Discharge Elimination System within Indian country. Hogen's five-page memorandum was submitted to the Office of General Counsel of the U.S. Environmental Protection Agency along with a 31-page memorandum prepared by counsel for the Micmacs (who is also counsel for the Micmacs in this case) in consultation with attorneys from the Department of the Interior and the Department of Justice. Hogen noted that "[t]he Micmacs' detailed legal memorandum incorporates comments from the two Departments and we concur with its conclusions." His memo stated:

The Department, as the primary federal agency responsible for interpreting the Maine Indian settlement acts, has analyzed the legal status of the Aroostook Band of Micmac Indians (Micmacs) and we conclude that under the Aroostook Band of Micmac Settlement Act (ABMSA), the Micmacs have retained their inherent tribal sovereignty.The substance of the memo's analysis is reflected in three section headings: (1) "The 1989 State and 1991 Federal Micmac Settlement Acts Replaced the Earlier Settlement Acts to the Extent the Earlier Acts Applied to the Micmacs," (2) "The [MSA] does not Subject the Micmacs to State Law because the [MSA] Never Became Effective," and (3) "Congress Intended the [MSA] and ABMSA to Embody the Settlements with the Micmacs, thereby Repealing the Provisions of the [Maine Implementing Act] and MICSA Previously Applicable to the Micmacs." In the last of those sections, the memo states: "To the extent Congress intended the earlier settlement acts to continue to apply to the Micmacs, Congress specified those sections in the ABMSA."

Civil No. 03-24-B-K
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

AROOSTOOK BAND OF MICMACS,
Plaintiff

v.

PATRICIA E. RYAN, et. al,
Defendants

December 5, 2005, Decided

COUNSEL: For AROOSTOOK BAND OF MICMACS, Plaintiff: DOUGLAS J. LUCKERMAN, LEXINGTON, MA; GREGORY P. DORR, FARRELL, NATHANIEL M. ROSENBLATT, FARRELL, ROSENBLATT & RUSSELL, BANGOR, ME.

For EXECUTIVE DIRECTOR, ME, HUMAN RIGHTS COMMISSION, MEMBERS, ME HUMAN RIGHTS COMMISSION, Defendants: PAUL STERN, ASSISTANT ATTORNEY GENERAL, AUGUSTA, ME; CHRISTOPHER C. TAUB, MAINE ATTORNEY, GENERAL'S OFFICE, AUGUSTA, ME.

For LISA GARDINER, TAMMY CONDON, Defendants: DAVID G. WEBBERT, MATTHEW SHERBURNE KEEGAN, JOHNSON & WEBBERT, LLP, AUGUSTA, ME.

For BEVERLY AYOOB, Defendant: Pro se, Limestone, ME.

JUDGES: Margaret J. Kravchuk, United States Magistrate Judge.

OPINION BY: Margaret J. Kravchuk

OPINION

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT[1]

These cross motions for summary judgment are back in front of me after the First Circuit Court of Appeals concluded that I erred in dismissing the Aroostook Band of Micmac's suit for declaratory and injunctive relief for want of jurisdiction. [2] This action was brought by the Band against three former Band employees -- Lisa Gardiner, Tammy Condon, and Beverly Ayoob -- Patricia Ryan, the executive director of the Maine Human Rights Commission, and members of the Maine Human Rights Commission. The Commission defendants, who pull the laboring oar for all the defendants, [3] are charged with vetting the employee claims of discrimination, a process that is a prerequisite to the filing of a civil action with a claim under the Maine Human Rights Act and/or the Maine Whistleblower Protection Act.

There are two pair of federal and state statutory schemes at issue in this dispute: The 1980 federal Maine Indian Claims Settlement Act (MICSA) which ratified the Maine Implementing Act (MIA), state legislation that worked settlements among the Penobscot Nation, the Passamaquoddy Tribe, The Houlton Band of Maliseet Indians, and the State of Maine, and the 1991

federal Aroostook Band of Micmacs Settlement Act (ABMSA) which followed in the wake of the 1989 state Micmac Settlement Act (MMSA). [4]

In these cross motions for summary judgment (Docket Nos. 36, 40 & 41) the parties dispute whether or not the terms of the MMSA, which clearly made the Band subject to state law, [5] can be given any effect As its central thesis the Band asserts that, no matter how the court slices these federal and state legislative enactments, the Band prevails because one rule, stemming from the federal common law of Indian self-government, must apply: State employment laws -- in this case the Maine Human Rights Act (MHRA) and the Maine Whistleblower's Protection Act (MWPA) [6] -- do not apply to tribal government employment.

Discussion

As noted above, this case has already made one trip to the First Circuit Court of Appeals. See *Aroostook Band of Micmacs v. Ryan, 404 F.3d 48 (1st Cir. 2005).* That opinion provided a thorough summary of the Band's "particularly complex" relationship with the State, *id. at 53.* Although the Panel never reached the merits of the Band's five count complaint, see *id. at 52 n.4, 61 n.19,* the Panel's opinion set forth the legislative history of the two pairs of state/federal legislative enactments:

A. The 1980 Legislation

In the 1970s, two tribes -- the Penobscot Nation and the Passamaquoddy Tribe -- filed suit claiming much of Maine as their ancestral homelands. See generally *Penobscot Nation v. Fellencer, 164 F.3d 706, 707-08 (1st*

Cir. 1999) (recounting history). Neither tribe was federally recognized at that point. The Aroostook Band of Micmacs was not represented by counsel at the time and was not a party to the litigation. [7]

In 1980, with the aid of the United States, the Penobscots and the Passamaquoddy reached a compromise with Maine. A third tribe, the Houlton Band of Maliseet Indians, which had not filed suit but was represented by counsel and had a potential claim, was later included in the compromise. See S.Rep. No. 101-291 (1990). The resulting settlement was embodied in the Maine Implementing Act, *Me.Rev.Stat. Ann. tit. 30, §§ 6201-14*; see also *25 U.S.C. § 1721(a)(8)* ("The State of Maine, with the agreement of the Passamaquoddy Tribe and the Penobscot Nation, has enacted legislation defining the relationship between the Passamaquoddy Tribe, the Penobscot Nation, and their members, and the State of Maine."); *Houlton Band of Maliseet Indians v. Me. Human Rights Comm'n, 960 F.Supp. 449, 451-52 (D.Me. 1997).*

Under the Act -- which affected "all Indians, Indian nations, and tribes and bands of Indians in the State," *Me.Rev.Stat. Ann. tit. 30, § 6204*, not just the named tribes -- the Penobscots and the Passamaquoddy received somewhat more advantageous terms than the Maliseets. The Penobscots and the Passamaquoddy obtained territory and all the governmental rights and powers of municipalities within Maine. See id. *§§ 6205, 6206, 6211.* By contrast, the Maliseets received only land held in trust for them by the United States, and no municipal powers. See id. *§§ 6205-A, 6206-A.* In exchange for what the tribes received, and "partly as a result of the Tribes' disputed status, the State of Maine, as part of the settlement, obtained legal authority over

the Tribes exceeding the usual state authority over native American tribes." *Penobscot Nation v. Georgia-Pac. Corp., 254 F.3d 317, 320 (1st Cir. 2001)* ("Penobscot Nation II"), *aff'g 106 F.Supp.2d 81, 82-83 (D.Me.2000)* ("Penobscot Nation I "). Here, too, the tribes did not receive equally favorable treatment. For reasons that will become apparent later, we highlight the special status of the Maliseets. Before the passage of the Maine Implementing Act, neither Maine nor the United States had officially recognized the Maliseets, and Maine was reluctant to accord them special status. Instead, the Act subjected the Maliseets to Maine law to a greater degree than the Penobscots or the Passamaquoddy. The Maliseets were subject to a default clause applicable to all Indian tribes:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Me.Rev.Stat. Ann. tit. 30, § 6204. However, the Penobscots and Passamaquoddy benefit[]ed from an important exception: for those two tribes, "internal tribal matters, including . . . tribal organization, [and] tribal government . . . shall not be subject to regulation by the State." Id. *§ 6206(1).* By contrast, the Maliseets received no such privilege. Rather, the Act emphasized that "the Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State." Id. *§ 6202.* Congress ratified the settlement through the Maine Indian Claims Settlement Act ("MICSA"), *25 U.S.C. §§ 1721-1735.* Among MICSA's purposes were

"to ratify the Maine Implementing Act" and "to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine." Id. *§§ 1721(b)(3)-(4).* MICSA reiterated the distinction between the Maliseets and the other two tribes as to applicability of Maine law:

> Except as provided in [two provisions not relevant here], all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

Id. *§ 1725(a).* [8]

B. The Micmac Legislation

In the years following the passage of MICSA, the Band, through counsel, raised its own claims with the state of Maine. In 1989, Maine and the Band reached a settlement that was memorialized in the Micmac Settlement Act, *Me.Rev.Stat. Ann. tit. 30, §§ 7201-7207.* The Act generally accorded the Band the same status as the Maliseets, not the greater powers and autonomy enjoyed by the Penobscots and the Passamaquoddy. See id. *§§ 7203* (subjecting Band to state laws and court jurisdiction without exception), 7204 (land to be held in trust by United States), 7205 (no municipal powers for Band).

In 1991, at the behest of both Maine and the Band, Congress enacted the Aroostook Band of Micmacs

Settlement Act ("Federal Micmac Settlement Act"), Pub.L. No. 102-171, 105 Stat. 1143 (codified at 25 U.S.C. § 1721 note). The Federal Micmac Settlement Act explained that "the Band was not referred to in [MICSA] because historical documentation of the Micmac presence in Maine was not available at that time." Id. § 2(a)(2), 105 Stat. at 1143. Now that such documentation was available, Congress found that "the Aroostook Band of Micmacs, in both its history and its presence in Maine, is similar to the Houlton Band of Maliseet Indians and would have received similar treatment under [MICSA] if the information available today had been available to Congress and the parties at that time." Id. § 2(a)(4). Consequently, the Federal Micmac Settlement Act aimed to "afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent [the Micmacs] would have benefited from inclusion in [MICSA]." Id. § 2(a)(5). On this basis, Congress "ratified the [state] Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs." Id. § 2(b)(4), 105 Stat. at 1144.

Id. at 53-55.

I.

A. Count One -- Application of the Maine Employment Discrimination Laws to the Band

1. The Status of the Maine Micmac Settlement Act

The first question that must be answered to resolve these motions is whether or not the MMSA has any

operative legal meaning in determining whether or not the Band is subject to the state employment discrimination laws.

The dispute about whether or not the MMSA is an effective law turns on the certification and non-modification provisions in the MMSA "effective date" provision. Section 4 of "An Act to Implement the Aroostook Band of Micmacs Settlement Act," P.L. 1989, ch. 148, passed at the First Regular Session of the 114th Legislature of the State of Maine, states:

> **Effective date.** This Act shall be effective only if: 1. The United States enacts legislation: A. Ratifying and approving this Act without modification; and B. Providing the consent of the United States for amendments to this Act, with respect to the Aroostook Band of Micmacs, provided that such amendment of this Act is made with the agreement of the Aroostook Band of Micmacs; and 2. Within 60 days of adjournment of the Legislature, the Secretary of State receives written certification by the Council of the Aroostook Band of Micmacs that the band has agreed to this Act, copies of which shall be submitted by the Secretary of State to the Secretary of the Senate and the Clerk of the House of Representatives, provided that in no event shall this Act become effective until 90 days after adjournment of the Legislature.

(Band SMF PP 58, 59; Comm'n Resp. Pl.'s SMF P 59, 59) (emphasis added). [9]

Certification Requirement

The Band argues that the MMSA is not a valid enactment because the Band never attempted to comply with the written certification requirement contained in an amendment to this state settlement act. The First Regular Session of the 114th Legislature of the State of Maine adjourned on July 1, 1989. (Band SMF P 60; Comm'n Resp. Pl.'s SMF P 60.) The Secretary of State did not receive the written certification described in section 4(2) within sixty days of July 1, 1989. (Band SMF P 61; Comm'n Resp. Pl.'s SMF P 61.) The Secretary of State has never received the written certification. (Band SMF P 62; Comm'n Resp. Pl.'s SMF P 62.) [10]

The Commission contends that the only reason that the Band failed to send in the written certification is that the Band was never told about the certification requirement (which was inserted in an amendment) and the Band therefore did not know about the requirement. (Comm'n SMF P 43; Band Dep. at 47-48, 52-53; Heald Dep. at 21-23, 33.) The Band complains that the Commission is mischaracterizing the Band's deposition testimony on this point. (Band Resp. Comm'n SMF P 43.) According to the Band, Mary Philbrook, who was deposed as a representative of the Band, never testified that "the only reason the Band failed to send in the written certification is that the Band was never told about the certification requirement." Philbrook simply testified that "we didn't know about the certification." (Id.; Band Dep. at 48, 53.) The Band contends that the reason why the Band failed

to submit the written certification is not material. (Band Resp. Comm'n SMF P 43; see also supra note 10.)

The parties agree that the Band did not know about the certification requirement until 1997, when an employee of the State of Maine called one of the Band's employees to ask whether the Band had certified the Micmac Settlement Act. (Comm'n SMF P 44; Band Dep. at 42-44; Pl.'s Answer Interrog. 2; Band Resp. Comm'n SMF P 44.) The Band, argues the Commission, does not know of any reason that it would not have sent in the written certification, had it known about the certification requirement. (Comm'n SMF P 48; Band Dep. at 48.) The Band rejoins again that in its view it is immaterial whether or not the Band would have approved the Act. (Band Resp. Comm'n SMF P 48.) It repeats that the Band did not discuss or vote on the certification or approval of L.D. 272 after it was enacted (id.; Band Dep. at 41, 53) and there is no evidence in the record to suggest that the Band would have approved the certification of MMSA especially given the State's sweeping interpretation of its authority over the Band under the act (Band Resp. Comm'n SMF P 48).

The Band cites to a legal opinion provided to the Maine Deputy Secretary of State with respect to a similar certification provision in the 1985 "Act Relating to the Time of Penobscot Nation Trust Land Acquisition" That act required that the Penobscot Nation submit a certification of its agreement within sixty-two days of the adjournment of the legislature and the certification was submitted sixty-two days after the adjournment. The Attorney General's opinion was that the legislation was not effective and that the only remedy was a reenactment of the legislation. (Band SMF Ex. H Attach. XI.) In that opinion the

Attorney General noted that it was "especially necessary to be strict in interpreting these provisions in that it deals with the question of land acquisition" and that it was important to forestall legal challenges by third parties that could cloud title. (Id.; see also id. Attach XII.)

The authorities I found that are, at least somewhat, analogous to the deficiency in the enactment of MMSA supports the Attorney General's conclusion and the Band's position. These cases view similar consummative prerequisites as key to the legislation's validity. See, e.g., *State ex rel. Ashcroft v. Blunt, 696 S.W.2d 329, 331 (Mo. 1985)* (en banc) ("The bill passed by the houses never reached the governor. It was inadvertently modified in route. . . . This Court has no authority to speculate whether the governor would have signed the bill which passed the houses."); *State ex rel. Osborn v. City of McAllen, 127 Tex. 63, 91 S.W.2d 688, 690 (Tex. Comm'n App. 1936)* ("The authorities are in unison that where charters and statutes require it, submission to and approval by the mayor of ordinances or resolutions or certain classes thereof, after they have been passed by the council, are indispensable to their validity, except under circumstances specifically enumerated in the charters or statutes, such as failure of the mayor to act within a designated time after submission for approval or after passage over his veto."). The certification by the governing body of the Band is not a mere ministerial act. So, while the defendants assert that there was an implied certification because the Band assumed for years that the MMSA was effective, I could not find authority that swayed me that a court could in this way finesse what is

clearly the absence of a state legislative imposed precondition to the statute's valid enactment.

And, in a connected vein, I do not view this certification shortfall as akin to cases dealing with long relied-upon, although invalid zoning ordinances which raise concerns about waiver, estoppel, or laches. See *Town of Florence v. Sea Lands, Ltd., 759 So.2d 1221, 1228-29 (Miss. 2000)*; *Edel v. Filer Twp., 49 Mich. App. 210, 211 N.W.2d 547, 549-50 (Mich. App. 1973)*; *Walker v. City of Biloxi, 229 Miss. 890, 92 So.2d 227, 229 (Miss. 1957)*; *City of Creston v. Center Milk Products Co., 243 Iowa 611, 51 N.W.2d 463, 465 (Iowa 1952).* The defendants do not mount a well-supported case for estoppel, beyond general discontent with the notion that the Band -- having agreed to the terms of the MMSA and thinking that the MMSA had indeed taken effect -- can now press this argument that it did not [11]

Non-modification Requirement

MMSA's effectiveness provision also required that the United States enact legislation ratifying and approving the state act "without modification." The Band argues that there were at least three modifications of the state legislation worked by ABMSA. It cites to § 5(c)(1) pertaining to land and natural resource condemnation and alienation, § 4(c) pertaining to taxation, and § 5(c) pertaining to the acquisition of land by the Band. [12] My conclusion vis-a-vis the Band's failure to certify makes it unnecessary to explore this more nuanced concern regarding the effectiveness provision.

Congressional Ratification/Incorporation

With respect to both of these challenges to the effectiveness of L.D. 272/MMSA the Commission and defendants Gardiner and Condon argue that Congress ratified the state act by enacting ABMSA. The Band concedes that it was Congress's intended purpose to ratify MMSA as set forth in ABMSA § 2(b)(4), and that, even in the absence of a substantive provision providing that the federal statute is ratifying the state act, this section and the legislative history might support a conclusion that there was an implied ratification. However, the Band maintains, the United States Congress simply cannot make effective a state law that is ineffective because of a failure to comply with a effectiveness provision of that state law that the state legislature enacted. I agree that Congress could not cure the defects in the MMSA effectiveness provision by enacting ABMSA, thereby making MMSA an effective state law.

A similar issue was addressed in Kickapoo Tribe of Indians v. Babbitt, a case involving a compact between the Governor of Kansas and the Kickapoo Tribe to allow gaming. The Secretary of the Interior ratified the compact but the District Court observed, "The fact that the compact is deemed approved, however, does not mean that the compact necessarily is binding and operational. Rather, as defendants next argue, even if the compact is deemed approved, it nonetheless may be void if the Governor's inability to bind the State of Kansas renders the compact invalid." *827 F.Supp. 37, 44 (D.D.C. 1993)* rev'd on other grounds *310 U.S. App. D.C. 66, 43 F.3d 1491.* The Court concluded that the compact was not binding, even though it is deemed approved by operation of statute. *Id. at 46.* The Tenth Circuit followed this reasoning in *Pueblo of Santa Ana*

v. Kelly, 104 F.3d 1546, 1554-55 (10th Cir. 1997). It also rejected the Tribe's assertion "that the Governor's act of signing the compacts without authority was merely a voidable act, which the Secretary of the Interior in essence cured' by approving the compacts." Of relevance to this dispute, Pueblo of Santa Ana refused to follow cases that "involved an unauthorized act which was subsequently ratified or approved by the body with clear authority to ratify or approve the action" because "they do not support the argument that a federal official can ratify or authorize an unauthorized state actor's conduct." *Id. at 1557.* See also *Narragansett Indian Tribe v. Rhode Island, 1996 U.S. Dist. LEXIS 11472, Civ. A. Nos. 94-0618-T, 94-0619-T and 95-0034-T, 1996 WL 97856, 2 (D.RI. Feb. 13, 1996)* ("For present purposes, the only thing that need be said is that the "1994 compact" is void in the same sense that any document executed without proper authority is void; namely, it has no legal effect."). [13]

There is no doubt that Congress did (and still does) have the power to enact federal legislation which, despite the lack of an effective state law, included the terms of that legislation in the federal act making those terms federal law. And on this score, the Band points out that Congress knew how to incorporate the provisions of a state settlement act into the federal legislation as it did so in MICSA. The Band notes that *MICSA § 1725(b)(1)* provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction

> of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. § 1725(b)(1) (emphasis added); *MICSA § 1725(d)(1)* provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and section 1362 of Title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however*, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act

25 U.S.C. § 1725(d)(1)(underscored emphasis added); and *MICSA § 1725(f)* provides:

> The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by

> the Maine Implementing Act, and any subsequent amendments thereto.

25 U.S.C. § 1725(f). ABMSA, in contrast, nowhere incorporates the terms of the MMSA into ABMSA. See supra note 8.

Thus, despite the fact that Congress indicated that one of the purposes of ABMSA was to "ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs," 25 U.S.C. § 1721 note § 2(b)(4), I conclude that ABMSA failed to make the terms of the MMSA which defined the relationship between the Band and the State of Maine federal law. [14]

2. The Federal Settlement Acts and the Band's Susceptibility to Suit Under the Maine Employment Laws

Having concluded that the Micmac Settlement Act is not a valid enactment the task remains to identify to what extent the Band is subject to the Maine Human Rights Act vis-a-vis its employment decisions.

In two passages that tee-up this issue, the First Circuit explained in its decision:

> Three provisions of the Federal Micmac Settlement Act are relevant here. First, the Act provides for self-governance: "The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity." Id. § 7(a), 105 Stat. at 1148.

Second, despite Congress's stated desire to provide the Band with "the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims," id. § 2(a)(5), 105 Stat. at 1143, the Federal Micmac Settlement Act does not explicitly subject the Band to Maine law. Section 6(b) of the federal act, entitled "Laws Applicable," subjects the Band to federal law on the same terms as the other Maine tribes. 105 Stat. at 1148. Nothing in the federal act explicitly subjects the Band to Maine law. By contrast, the earlier MICSA explicitly stated that all Indian tribes other than the Passamaquoddy and Penobscots "shall be subject to the civil . . . jurisdiction of the State, the laws of the State, and the civil . . . jurisdiction of the courts of the State, to the same extent as any other person or land therein." *25 U.S.C. § 1725(a)*; id. *§ 1721(b)(4)*.

Finally, the federal act provided that "in the event of a conflict of interpretation between the provisions of the [state] Maine Implementing Act [affecting the Penobscots, Passamaquoddy, and Maliseets], the [state] Micmac Settlement Act, or the [federal] Maine Indian Claims Settlement Act of 1980 and this Act, the provisions of this [Federal Micmac Settlement] Act shall govern." Federal Micmac Settlement Act § 11, 105 Stat. at 1149.

404 F.3d at 55.

I come to the following conclusions apropos the applicability of the provisions of MICSA and ABMSA to the Band. First, § 6(a) conferred federal recognition for the first time on the Band:

> **Federal recognition.** -- Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible to receive all of the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.

25 U.S.C. § 1721 note § 6(a). Therefore, ABMSA is inconsistent' with MICSA as the Band was not granted federal recognition by MICSA.

Second, § 6(b) tethers the Band's federal recognition to MICSA: "For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980." Id. § 6(b). The Band's federal recognition is not, as the Band would have it, utterly apart from the special arrangement worked by Congress vis-a-vis the Maine Indian tribes. See *Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)* ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional

intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal "must be clear and manifest.'" *United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 84 L. Ed. 181 (1939).*"). As the First Circuit stated in Aroostook Band of Micmacs, "Section 6(b) of the federal act, entitled Laws Applicable,' subjects the Band to federal law on the same terms as the other Maine tribes." *404 F.3d at 63.* The implications of this limitation apropos the Band/State relationship may play out in a variety of ways given the nature of the dispute; I need only determine what they are with respect to state law suits for employment discrimination.

This brings me to the third step towards solving this puzzle. Given this federal recognition worked by § 6(a), the simultaneous right to self-governance conferred in § 7(a), and the absence of any provision in ABMSA (spelled out within its text or through incorporation) that defines the extent to which the Band is subject to suit in Maine, compare *25 U.S.C. § 1725(b)(1), (d)(1),* and *(f)* and id. *§ 1771c(a)(1)(A), (B);* see cf. *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994)* ("By its terms, the Settlement Act purposes to do no more than grant jurisdiction to the state; it does not expressly strip the Tribe of jurisdiction, transfer jurisdiction from the Tribe to the state, or employ suggestive adjectives like "exclusive" or "complete" in describing the jurisdictional grant."), [15] it would be inconsistent with ABMSA to conclude that the Band is subject to suit in the same manner as are the Maliseets. For, the Maliseets are a Band which is expressly subject to suit the same as any other person

in MICSA, as were other Maine tribes who were not federally recognized. See *25 U.S.C. § 1725(a).* [16]

Accordingly, ABMSA § 11 is triggered and, with respect to the Band's rights to self-government, ABMSA's § 7(a) trumps *MICSA § 1725(a).*

Once again, § 7(a) ABMSA provides as relevant:

> **"Sec. 7. Tribal organization.**
>
> **"(a) In general.** -- The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and any amendments thereto.

25 U.S.C.A. § 1721 note § 7. [17]

MICSA contains the following self-governing provision:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and the Maine Implementing

> Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.

25 U.S.C. § 1726(a) (emphasis added). The Band emphasizes that the underlined portion of the MICSA self-government provision, in contrast to ABMSA, requires that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseets self-govern in conformance with the MIA which contains the *30 M.R.S.A. § 6206(2)* "sue and be sued" provision ratified by MICSA's *§ 1725(a)*. See *Aroostook Band of Micmacs, 404 F.3d at 63-64* (summarizing this argument); see also *id. at 64 n.25* ("We express no view on whether the Federal Micmac Settlement Act's apparent differences from MICSA or the Maine Implementing Act actually create an inconsistency, let alone a conflict to which Section 11 of the Federal Micmac Settlement Act would apply. We simply note that it may be necessary to resolve this question in determining the substantive reach of Section 7(a) of the Federal Micmac Settlement Act.").

In order to determine what the right to self-governance conferred by § 7(a) means with respect to the defendants' ability to investigate and/or sue the Band under the Maine Human Rights Act for employment discrimination, I, as the Band urges, look to federal common law. [18] The Band contends that ABMSA § 7(a) should be read to prevent the Commission defendants from pursuing employment discrimination claims under the Maine Human Rights Act against them because these Commission

investigations and employee suits impermissibly interfere with the Band's right to self-government. [19]

According to the Band, the § 7(a) self-government provision, unlimited in contrast to MICSA's *§ 1726(a) and MIA*'s *§ 6206(2)*, "reaffirms and codifies the common law doctrine of tribal sovereignty as it applies to the Band," *Aroostook Band of Micmacs, 404 F.3d at 52 n.3.*

The First Circuit's Aroostook Band of Micmacs decision discussed the breadth of the powers of tribal sovereignty when at its apex:

> Tribal "retained sovereignty predates federal recognition -- indeed, it predates the birth of the Republic." *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994).* "Because of their sovereign status, tribes . . . are insulated in some respects by a historic immunity from state and local control,' and tribes retain any aspect of their historical sovereignty not inconsistent with the overriding interests of the National Government.'" *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)* (citations omitted).
>
> When we speak of a tribe's sovereignty, we mean its powers as a government. At its apex, tribal sovereignty can include broad powers to determine the form of tribal government; to determine membership; to "enact substantive criminal and civil laws" that apply to tribal members within tribal

> territory; to regulate domestic relations, such as marriages and divorces, and "the descent and distribution of the property of tribal members"; to impose taxes; to operate court systems and administer justice; and to exclude persons from tribal territory. See Felix S. Cohen, Handbook of Federal Indian Law 246-52 (1982 ed.). Of course, not all tribes retain the full panoply of these powers today. A tribe retains those aspects of sovereignty that have not been "withdrawn by treaty or statute, or by implication as a necessary result of [the tribe's] dependent status." *United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).* Congress's broad powers over tribes are both "plenary and exclusive," *United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)* (quotation marks and citation omitted), and "only Congress can abrogate or limit an Indian tribe's sovereignty," *Fellencer, 164 F.3d at 709*

Id. at 62.

The Panel recognized that § 7(a) was a codification of a right to self-governance. *Id. at 63* ("In addition to inherent sovereignty, the Band also asserts a statutory right to self-governance codified in Section 7(a) of the Federal Micmac Settlement Act."). Apropos this right to self-government under federal common law the Panel explained:

> One important aspect of tribal sovereignty is "the power of regulating [its] internal and social relations,' "which includes the "right of internal self-government." [*United States v.] Wheeler, 435 U.S. [313,] 322, 98 S. Ct. 1079, 55 L. Ed. 2d 303 [(1978)]* (citation omitted). A tribe's power to "maintain or establish its own form of government. . . . is the first element of sovereignty." [S. Cohen,] Handbook of Federal Indian Law,] 247 [(1982 ed.)]. The form of tribal government "may reflect the tribe's determination as to what form best fits its needs based on practical, cultural, historical, or religious considerations." Id.

404 F.3d at 62. Significantly, in a footnote to this passage the Panel noted:

> The phrase "tribal self-government" has been used in two distinct ways. In a broad sense, it can mean a tribe's power to regulate the conduct of tribal members. See, e.g., *Wheeler, 435 U.S. at 322* ("Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."). We do not understand the Band to claim that it has this power. A second, narrower sense means the tribe's power to determine the structure and internal operations of the governing body itself. See, e.g., Handbook of Federal Indian Law, supra, at 247. This is the meaning we emphasize.

Id. at 62 n.21 (emphasis added).

Although focused on the "internal tribal matters" language of MICSA, Fellencer also touched upon the concept of Indian self-government with respect to the Penobscot Nation and made it clear that there is some overlap with respect to the concepts of "internal tribal matters" and the right to self-government. Discussing the Congressional decision to exempt Indian tribes from Title VII's definition of "employer," the Panel noted that: "The Supreme Court has characterized this exemption as Congress' recognition of the longstanding federal policy of providing a unique legal status to the Indians in matters of tribal employment,' and it characterized Congressional intent as a 'policy of furthering Indian self-government. '" *164 F.3d at 711* (quoting *Morton v. Mancari, 417 U.S. 535, 548, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).* [20]

In a footnote following up on the connection between the tribal right to self-government and employment discrimination claims, the Fellencer Panel observed:

> Two circuits have extended this exemption to bar claims against Indian tribes based on the Age Discrimination in Employment Act (ADEA), *29 U.S.C. §§ 621-34*, even though no similar express exemption is contained in the ADEA. These courts premised the implied exemption from federal court jurisdiction over age-based discrimination claims on the Indian tribes' right to self-government. See *EEOC v. Fond du Lac Heavy Equip. and Const. Co., 986 F.2d 246, 249 (8th Cir. 1993)*; *EEOC v.*

Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989).

Id. at 711 n.4.

Since Fond du Lac Heavy Equip. and Const. Co. and Cherokee Nation other Circuit Courts of Appeal have similarly concluded that the right to discharge employees is a right implicating a tribe's right to self-govern and concluded that federal employment related claims cannot be maintained against (self-governing) tribes even when there is not express statutory exemption on par with Title VII. See *Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004)* (Fair Labor Standard's Act claim); *Taylor v. Alabama Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1034-35 (11th Cir. 2001)* (*42 U.S.C. § 1981* racial discrimination in employment); *E.E.O.C. v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1080 (9th Cir. 2001)* (Age Discrimination Employment Act). 1 can identify no reason why the same would not hold true for state employment discrimination claims when a tribe has a common-law or equivalent statutory right to self-government.

In sum, there is no provision in either MICSA or ABMSA -- either expressly or through incorporation -- that subjects the Band to Maine employment discrimination laws. Congress may have intended to include a sue and be sued provision in AMBSA, see 25 U.S.C. § 1721 note § 2(b)(4), but it did not accomplish this.

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its

> intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *United States v. Granderson, 511 U.S. 39, 68, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994)* (concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.

Lamie v. United States Tr., 540 U.S. 526, 542, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). Understandably the defendants would have this Court focus on the legislative intent, some of which clearly supports their position and conclude that the Band is subject to suit in the same manner as the Maliseets, but codifying that intent is a job for Congress and not this court See *Conroy v. Aniskoff, 507 U.S. 511, 518-19, 527-28, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993)* (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. . . . The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously."); *Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005)*("Boosting the level of generality by attempting to discern and enforce legislative purposes' or goals' instead of the enacted

language is just a means to turn rules into standards."). [21] Finally, following the First Circuit cues in *Fellencer* and *Aroostook Band of Micmacs*, I conclude that a fair reading of ABMSA's § 7(a) is that it is a codification of a common-law right of self-government which, at a minimum, protects "the tribe's power to determine the structure and internal operations of the governing body itself" and that this right encompasses employment decisions by the Band.

B. Count Two -- The Band's Tribal Sovereign Immunity

My conclusion that the Band's statutory self-governance rights preclude the defendants' efforts to investigate and sue the Band for state-law employment discrimination claims means that it is unnecessary for me to decide whether or not the Band could successfully assert a sovereign immunity right even if the federal acts had made the Band subject to suit as envisioned by MMSA. See *Aroostook Band of Micmacs, 404 F.3d at 69.*

C. Count Three -- Title VII Exemption

In Count Three of the Band's complaint the Band asserts that it is exempt from the definition of "employer" contained in *42 U.S.C. § 2000e(b)* and that, therefore, Title VII is not applicable to it. In *Aroostook Band of Micmacs v. Executive Director Maine Human Rights Commission, 307 F.Supp. 2d 95, 106-07 (D. Me. 2004)* I "apparently" concluded that there was no case and controversy apropos this count because the parties agreed that the Band was exempt from Title VII investigations and actions and, therefore, viewed Count Three as moot. See *Aroostook Band of Micmacs, 404*

F.3d at 70 ("While the district court did not identify which branch of case or controversy doctrine supported its ruling, we understand it to have meant the dispute was moot.").

The First Circuit explained how this disposition was in error for the simple reason that the defendants were free to return to their "old ways.'" *Id. at 70* (quoting *United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)).* The Panel also found fault with my conclusion that the referral of these charges by the Commission could have no operative effect under the law given the conclusion of *Boudman v. Aroostook Band of Micmac Indians, 54 F. Supp. 2d 44 (D. Me. 1999)* -- relying on *Shannon v. Houlton Band of Maliseet Indians, 54 F. Supp. 2d 35 (D. Me. 1999)* -- that the Band was not a Title VII actionable employer. The Panel explained:

> We read this as finding that the complaint does not allege an injury-in-fact for standing purposes. In other words, even if the Commission erroneously files an EEOC charge against the Band, such referral causes no cognizable injury. See generally *Steir v. Girl Scouts of the USA, 383 F.3d 7, 14-15 (1st Cir. 2004)* (summarizing Article III injury-in-fact requirement).
>
> We disagree. As a general rule, "when the suit is one challenging the legality of government action . . . [and] the plaintiff is himself an object of the action. . . . there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Band alleges two specific injuries from the Commission's filing of charges with the EEOC. First, the Band asserts dignitary harm: it is forced to defend itself to the EEOC when, it claims, Congress has shielded the Band from such investigations entirely. As the Band notes, if "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing," *id. at 562-63*, then repeated filing of arguably frivolous federal charges against an Indian tribe that Congress has expressly exempted from the law's reach also causes a cognizable injury. Similarly, if the loss of the right to litigate in the forum of one's choice is cognizable, see *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991)*, superseded by statute on other grounds as stated in *Parker v. Della Rocco, 252 F.3d 663, 666 n. 2 (2d Cir. 2001)*, then so too is being forced to litigate in a forum where one is not required to appear at all.

Second, the Band asserts economic harm: it must respond to the charge and pay attorneys to argue that it is exempt. Even assuming that the EEOC immediately agrees with the Band and dismisses each case, repeatedly forcing the Band to defend obviously futile Title VII complaints makes

> it incur financial costs that qualify as a cognizable injury. Cf. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-45, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)* (holding that denial of motion to dismiss on *Eleventh Amendment* grounds is immediately appealable under collateral order rule, and explaining that "the value to the States of their *Eleventh Amendment* immunity . . . is for the most part lost as litigation proceeds past motion practice").

Aroostook Band of Micmacs, 404 F.3d at 70-71.

Section 2000e(b) of title 42 of the United States Code defines "employer" and expressly provides that "such term does not include . . . an Indian tribe." *42 U.S.C. § 2000e(b)*(emphasis added). The Commission does not dispute that the Band is not subject to Title VII. (See Comm'n Mem. Mot. Summ. J. at 2 n.1, 41; Comm'n Opp'n Band Mot. Summ. J. at 7.) Nothing in MICSA or AMBSA undermines the Band's claim that it is not an employer within the meaning of Title VII. Per the statute's plain meaning that is uncontested here, I conclude that the Aroostook Band of Micmacs is not subject to suit under Title VII of the Civil Rights Act. [22]

D. Counts Four and Five-Title VII Exemption Preemption and the Maine Employment Laws' Definitions of "Employer"

With respect to Count Four, the Band asserts: "To the extent that the respective definitions of employer' contained in the MHRA and the MWPA include Indian tribes, these definitions are inconsistent with the definition of employer' contained in Title VII and from

Title VII itself." (Compl. P 83.) In Count Five the Band argues that it is not "a person'" within the meaning of either state employment act. (Id. PP 89-93.) There was little attention paid to these counts in this second round of summary judgment briefing and argument and it is fair to say that these two counts were, in a sense, "pled in the alternative" should the Band not meet with success on Counts One or Two. My conclusion that the Band cannot be sued under either the MHRA or MWPA because of its statutory right to self-government under ABMSA vitiates the need to address the legal issues generated by either of these counts.

II.

A. The Dispute about the Constitutionality of *25 U.S.C. § 1725(h)*

As the parties joined the issues in this second round, the Commission made an alternative argument that § 6(b) of ABMSA subjects the Band to federal law to the same extent as the MISCA tribes. The defendants then point to *25 U.S.C. § 1725(h)* which provides:

> General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine
>
> Except as other wise [sic] provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except

> that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. § 1725(h). It is the Commission's argument that this provision means that federal common law, including the common law doctrines of tribal sovereignty (and presumably self-governance) do not apply within the State of Maine. (Comm'n Defs.' Suppl. Brief at 18-19.)

The Band rejoins that such an interpretation would violate its rights under the *Fifth Amendment of the United States Constitution*, violate its constitutionally protected fundamental rights, violate the Indian *Commerce Clause* and the Non-Delegation Doctrine, and reverse the *Supremacy Clause.* (See generally Band Mot. Reconsideration Order Denying Additional Brs.; Band Outline Suppl. Authorities.)

I reject the Commission's argument (and do not reach the constitutional question) because my conclusion as to why the Band cannot be sued under the Maine employment discrimination statutes is based on an interpretation of a Congressional statutory right to self-governance in § 7(a) of ABMSA. And ABMSA expressly provides in § 11 that to the extent the

ABMSA conflicts with any provision of MICSA, then the provisions of ABMSA govern.

B. The Status of the Three Ex-employee Defendants' Discrimination Actions

In its decision the First Circuit recognized that the Band's complaint did not allege any unlawful activity on the part of Gardiner, Condon, or Ayoob, and that the Band was not seeking relief as against them. *Aroostook Band of Micmacs, 404 F.3d at 72.* The Panel assumed that these ex-employee defendants were joined pursuant to *Federal Rule of Civil Procedure 19(a)(2)* "because they have an interest in the action and, arguably, their ability to protect that interest would be impaired without their participation." *Id. at 72-73.* I now dismiss the actions of the Band against these three defendants as there does not appear to be any relief requested as against them.

Conclusion

Based upon the foregoing, I now direct the clerk to enter judgment for the Aroostook Band of Micmacs on Counts I and III of the complaint. I further permanently enjoin Defendant Ryan and the Commission defendants from applying the Maine Human Rights Act and the Maine Whistleblower's Protection Act against the Band because under the provisions of 25 U.S.C. § 1721 note § 7(a) the Band enjoys a statutory right of self-governance that prohibits the enforcement of state employment discrimination laws against the Band. In addition, I enjoin Defendant Ryan and the Commission defendants from applying Title VII, *42 U.S.C. §§ 2000e through 2000e-17* to the Band and from filing charges of

discrimination against the Band with the Equal Employment Opportunity Commission. The remaining counts of the complaint and the remaining defendants are dismissed as no further relief remains to be granted.

So Ordered.

December 5, 2005.

Margaret J. Kravchuk

U.S. Magistrate Judge

Footnotes

[1]Pursuant to *Federal Rule of Civil Procedure 73(b)*, the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

[2]The First Circuit also concluded that the Band's count asserting that it was not subject to suit under Title VII should be affirmatively decided by the court on the merits. Accordingly, I address the merits of this count below.

[3]For the most part I refer to the Commission defendants as the Commission. Former Band employees Gardiner and Condon are represented by the same counsel and have filed a one-page motion for summary judgment which requests that the court grant them summary judgment should the Commission defendants prevail. Gardiner and Condon have also chimed in after the case was remanded by the First Circuit Court of Appeals, filing a supplemental brief and a reply brief on some of the substantive issues.

[4] The Band uses the acronym "MMA" in referring to this act.

[5]The Band does argue that even if the terms of the MMSA do apply to it, the act gives the state concurrent jurisdiction and that the State's employment discrimination laws should give way to the Band's interest as an employer. The contours of this argument never crystalized.

[6]MWPA claims are made actionable through the MHRA. For simplicities sake I refer at times to these laws as Maine employment discrimination laws.

7 Here the Panel dropped the following footnote: "Apparently there was some confusion as to whether the Aroostook Band of Micmacs was distinct from the larger Canadian Band of Micmacs." Id. as 53 n.8 (citing S.Rep. No. 101-291 (1990)).

[8]Here the Court dropped this footnote: "We have also assumed that MICSA implicitly incorporates into federal law the "internal tribal matters" exception of the Maine Implementing Act as it applies to the Penobscots and the Passamaquoddy." *Id. at 54 n. 9*(citing *Penobscot Nation II, 254 F.3d at 320-21*). The portion of Penobscot Nation II cited to reads as follows:

> Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, . . . and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject

> to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. *Me. Rev. Stat. Ann. tit. 30 § 6206(1).*
>
> In the federal Settlement Act, Congress did not expressly include the provision just quoted; but the Settlement Act did state, as "a purpose" of the statute, Congress' intent "to ratify" the Maine Implementing Act "which defines" the relationship between the State of Maine and the Tribes. *25 U.S.C. § 1721(b)(3).* This court has assumed, albeit without extensive discussion, that the internal affairs limitation on state authority in the Maine Implementing Act is also an overriding federal limitation on Maine authority over the *Tribes. Akins v. Penobscot Nation, 130 F.3d 482, 485 (1st Cir. 1997)*; see also *25 U.S.C. § 1735.* The companies do not dispute that premise in this case.

254 F.3d at 320-21.

[9]The MIA did not include this certification requirement in its effectiveness provision. See *30 M.R.S.A. § 6202.* It did include the anti-modification requirement. See id.

[10]The Commission adds that on December 6, 2000, the Band's Chief, William Philips, sent a letter to Department of the Interior Solicitor John Leshy and Bureau of Indian Affairs Assistant Secretary Kevin Gover in which Chief Philips stated that the Band refused to certify its agreement with the state Micmac Settlement Act. (Comm'n SAMF P 6 & Ex. C.) On March 29, 2001, Chief Philips sent a memorandum to, among others, Secretary of the Interior Gale Norton and Attorney General John Ashcroft, in which Chief Phillips states: "While the State of Maine, through the [state Micmac Settlement Act], tried to remove our sovereignty and jurisdiction, we did not consent to this legislation and stopped it from taking effect." (Comm'n SAMF P 7 & Ex. D.) In the March 29 memorandum, Chief Philips also states that the Band "declined to agree" to the state Micmac Settlement Act and that "the Tribe did not agree with the [state Micmac Settlement Act] and did not submit a certification to the Secretary of State," and Chief Philips refers to the Band's "refusal to agree" to the state Micmac Settlement Act. (Comm'n SAMF P 8 & Ex. D.) In a February 18, 2002, memorandum, Chief Phillips states that the state Micmac Settlement Act "contained a provision requiring the Band must certify its agreement with the legislation, before the Act could take effect." He then states that the "Band never certified the agreement due to unfavorable terms and the act never took effect." (Comm'n SAMF P 9 & Ex. E.) In August 2000, the Band's counsel, Douglas Luckerman, submitted comments on behalf of the Band and another Indian tribe to the United States Environmental Protection Agency regarding a proposal to authorize the State to issue National Pollution Discharge Elimination System permits. After

discussing the state Micmac Settlement Act and the certification requirement, Mr. Luckerman stated that the Band "did not agree with the Micmac Statute and did not submit a written certification to the Secretary of State." (Comm'n SAMF P 10 & Ex. F.)

The Band does not dispute these five factual allegations but states that they are not relevant to whether or not the MMSA took effect and that the reason for the Band's non-certification is not a material fact. (Band Opp'n Comm'n SAMF PP 610; Philbrook Dep. at 52.)

[11]In terms of any unjust enrichment argument the settlement actually lifted a burden from the Maine taxpayers.

[12]As discussed below, the Band believes the most glaring "conflict" between the acts (as opposed to modification) is that between *§ 7205* of the MMSA and § 7(a) of ABMSA. Section 7205 of the MMSA provides: "The Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers." *30 M.R.S.A. § 7205* (emphasis added). Section 7(a) of ABMSA, on the other hand, provides as relevant: "The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act." 25 U.S.C. § 1721 note sec. 7(a). The Band describes this ABMSA provision as conferring the right

to self-government without qualification. It would be possible to construe this "conflict" as a "modification," but I do not so construe it for purposes of this decision.

[13]In their supplemental brief defendants Gardiner and Condon argue Congress has the power to cure defects in agreements when it ratifies agreements. (Gardiner & Condon Suppl. Brief at 3-5.) However, what these defendants overlook is that Congress, although it has the power to "ratify" the MMSA by incorporating its terms into ABMSA, it did not do so at the time of ABMSA's enactment and it has not done so in the fourteen years since.

[14]The process for deciding these motions for summary judgment has been not unlike solving a complex mind teasing puzzle with respect to which there is more than one way to put the pieces together. Given the high stakes for the Band and the State, I am sure that the question of whether each step in the course 1 chose is correct will be put to the test.

One of the other ways of solving this puzzle turns on whether or not the fact that Congress indicated in § 2(b)(4) that one of the four purposes of ABMSA was to ratify the MMSA which defines the relationship between the State and the Band creates a severability issue. ABMSA's findings and policy section also contains indications of this intent in sections 2(a)(4),(5). As the First Circuit noted, while MICSA contained a severability clause, see *25 U.S.C. § 1734*, ABMSA does not. See *Aroostook Band of Micmacs, 404 F.3d at 64 n.27.*

The State articulated a severability argument in this second round of summary judgment pleadings

arguing that if the MMSA is not effective Congress would have wanted the entire ABMSA to fail and have the Band's status revert to the terms of MICSA. (Comm'n Suppl. Br. Mot. Summ. J. at 8-11, Docket No. 93; see also Band Suppl. Reply Br. at 10, Docket No. 97.) If the puzzle is solved in this fashion, obviously a very different outcome may result. However, I am uncomfortable with the notion of reading an entire Congressional enactment out of existence, not because it is unconstitutional, but because one of its stated purposes has apparently failed. Congress can easily remedy that failure by adopting the terms of the MMSA itself, if it chooses to do so.

[15]The First Circuit explained in Narragansett Indian Tribe:

> Given the strong congressional bias, especially noticeable in the past generation, against policies that would promote Indian assimilation, see *Bryan [v. Itasca County, Minn.], 426 U.S. [373,] 387-88, 96 S. Ct. 2102, 48 L. Ed. 2d 710 & n. 14 [(1976)]*, and also given Congress's fortunate penchant for great clarity when expressing its intent in this area, *see id. at 389* ("Congress knows well how to express its intent directly when that intent [is] to subject . . . Indians to the full sweep of state laws."'); *Mattz v. Arnett, 412 U.S. 481, 504 n. 22, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973)* (observing that Congress generally employs "clear language of express termination when that result is desired") (collecting examples), we are of the view that acts diminishing the

sovereign rights of Indian tribes should be strictly construed.

19 F.3d at 702.

[16]If the court were to conclude that the MMSA was effective in any sense, the Band believes the most glaring conflict between MMSA and ABMSA is between *§ 7205* of the MMSA and § 7(a) of ABMSA. *Section 7205 of the MMSA* provides: "The Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers." *30 M.R.S.A. § 7205.* Section 7(a) of ABMSA, on the other hand, provides as relevant: "The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act." 25 U.S.C. § 1721 note sec. 7(a). The Band describes this ABMSA provision as conferring the right to self-government without qualification.

[17]The Indian Reorganization Act of 1934 contained the following provision apropos self-government which the Band describes as "virtually identical to ABMSA § 7(a)": "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto." *25 U.S.C.A. § 476(a).* In Morton v. Mancari, the Supreme Court observed vis-a-vis this provision: "The overriding purpose of [Indian Reorganization Act of

1933] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."). *417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).*

[18]Although the First Circuit's Penobscot Nation v. Fellencer addressed the "internal tribal matter" of MICSA applicable to the *Penobscot Nation, 164 F.3d 706, 713 (1st Cir. 1999)*, the Panel also made it clear that Congress intended that federal common law should give meaning to the terms of MICSA. *Id. at 712.* I cannot see why the same would not hold true apropos ABMSA.

[19]This question of course has yet to be litigated with respect to ABMSA when it is interpreted sans the MMSA subject to suit provision. *Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999)* (and *Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997)* in a non-employment discrimination context) dealt with the "internal tribal matter" language of *30 M.R.S.A. § 6206(1)* which was adopted by MICSA in *25 U.S.C. § 1725(d)(1)* which contains the proviso that "the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act." The case discusses the concept of self-government but does not discuss it in the context of *25 U.S.C. § 1726(a).* Following *Houlton Band of Maliseet Indians v. Maine Human Rights Commission, 960 F.Supp. 449, 453 (D.Me. 1997)*, District Court Judge Brody, concluded in Boudman v. Aroostook Band of Micmac Indians:

> As these provisions make clear, the Maliseet Indians are not subject to the "internal tribal matters" exception enjoyed by the

> Passamaquoddy and the Penobscot. Since Congress has indicated that Defendant is to be treated like the Maliseet Indians, the Court concludes that, like the Maliseet Indians, Defendant cannot claim immunity from suit based on an asserted "internal tribal matters" exception, which extends only to the Passamaquoddy and the Penobscot. Fellencer, which dealt solely with the Penobscot and the "internal tribal matters" exception that was clearly applicable in that case, is simply inapposite.

54 F.Supp.2d 44, 48 (D. Me. 1999) (footnote omitted). Judge Brody was not only not confronted with an argument that the MMSA did not take effect, he also was not presented with an argument that the self-governance provision of MICSA might prevent state employment discrimination suits despite the subject-to-suit provision. In its motion for summary judgment the Commission noted that the Band has already litigated this question in Boudman (Comm'n Mot. Summ. J. at 16 n.9, Docket No. 36), however it has not pressed a claim or issue preclusion argument in these proceedings.

[20]In support of its position, the Band argues that ABMSA's § 7(a) parallels *§ 476(a)* of title 25, of the Indian Reorganization Act which was at issue in *Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)*. As relevant that provision provides: "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto. . . ." *25 U.S.C. § 476(a)*. The Band also emphasizes Mancari's statement that: "The overriding purpose of

that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *417 U.S. at 542.*

[21]This is not even a situation in which I would be attempting to divine the meaning of a Congressional provision or term actually enacted; here there is no provision to interpret.

[22] Judge Brody reasoned in Boudman:

> In *Shannon v. Houlton Band of Maliseet Indians, 54 F.Supp.2d 35 (D.Me. 1999)*, this Court determined that the Maliseet Indians are subject to Title VII's exemption of Indian tribes from its reach. In light of the statutory evidence, discussed above, that Defendant is to be treated like the Maliseet Indians, the Court concludes that Defendant also is exempt from Title VII. Where a complaint as amended could not survive a motion to dismiss, then the motion to amend is to be denied as futile. See *Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996)* (motion to dismiss for failure to state a claim); *Schock v. United States, 21 F.Supp.2d 115, 124 (D.R.I.1998)* (motion to dismiss for lack of jurisdiction). Since amending the Complaint to add a Title VII claim would be futile, Plaintiff's Motion to Amend with respect to the Title VII claim is denied.

54 F.Supp.2d at 48-49. I do not rely on this reasoning in reaching my conclusion because of my earlier conclusion

that Congress did not enact legislation that provided that the Band should be treated like the Maliseets with respect to the ability of the Band to sue and be sued and because I do not see how the text of these particular state settlement acts (even assuming MMSA was valid) would have any impact on the Title VII exemption inquiry.

Nos. 06-1127, 06-1358

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AROOSTOOK BAND OF MICMACS,
Plaintiff, Appellee,

v.

PATRICIA E. RYAN, in her official capacity as Executive Director of the Human Rights Commission of the State of Maine; WARREN C. KESSLER, in his official capacity as member of the Human Rights Commission of the State of Maine; PAUL K. VESTAL, JR., in his official capacity as member of the Human Rights Commission of the State of Maine; JAMES VARNER, in his official capacity as member of the Human Rights Commission of the State of Maine; JADINE R. O'BRIEN, in her official capacity as member of the Human Rights Commission of the State of Maine; KRISTEN L. AIELLO, in her official capacity as member of the Human Rights Commission of the State of Maine; LISA GARDINER; TAMMY CONDON, Defendants, Appellants,
BEVERLY AYOOB, Defendant.

ORDER OF COURT

Entered: May 21, 2007

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by

the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

Constitutional, Statutory and Rule Provisions Implicated by This Petition.

United States Constitution, Article I, § 8:

> The Congress shall have Power...
> ...
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

25 U.S.C. § 1721(b)(4) (The Maine Indian Claims Settlement Act):

> **(b) Purposes**
> It is the purpose of this subchapter—
> ....
> (4) to confirm that all other Indians [besides the Passamaquoddy Tribe and the Penobscot Nation] Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

25 U.S.C. § 1724(d)(4):

> The Secretary [of the Interior] is authorized to...participate in negotiations between the State of Maine and the Houlton Band of the Maliseet

Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band....

25 U.S.C. § 1725(a); (b)(1); (d)(1); (e)(2); (f); (g) and (i):

(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State

Except as provided in section 1727(e) and 1724(d)(4) of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

....

(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States.

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act [30 MRSA §§ 6201-6214] and that Act is hereby approved, ratified and confirmed.

....

(d) Capacity to sue and be sued in the State of Maine and Federal Courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; section 1362 of Title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however*, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine

Implementing Act.

(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band lands.

....

(2) ...the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State Maine over lands owned by or held in trust for the benefit of the band or its members.

(f) Indian jurisdiction separate and distinct from State civil criminal jurisdiction.

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

(g) Full faith and credit.

The Passamaquoddy Tribe, The Penobscot Nation and the State of Maine shall give full faith and credit to the judicial proceedings of each other.

(i) Eligibility for Federal special programs and services regardless of reservation status.

As federally recognized Indian tribes, the

Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians....The Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation....

25 U.S.C. § 1726(a):

(a) Appropriate instrument in writing; filing of organic governing doucment.

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and any amendments thereto....

25 U.S.C. § 1727(e):

(e) Indian tribe within section 1903(8) of this title; State jurisdiction over child welfare unaffected.

For the purposes of this section, the Houlton

Band of Maliseet Indians is an "Indian tribe" within section 4(8) of the Act [25 U.S.C. § 1903(8)], provided, that nothing in this subsection shall alter or affect the jurisdiction of the State of Maine over child welfare matters provided in section 1725(e)(2) of this title.

25 U.S.C. § 1735(a):

(a) Law governing; special legislation.

In the event of a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this subchapter shall govern.

25 U.S.C. § 1721, note, § 2(b)(1) & (4) [The Federal Micmac Act of 1991]:

(b) Purpose. It is the purpose of this Act to–

(1) provide Federal recognition of the Band;

.....

(4) ratify the [State] Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs;

25 U.S.C. § 1721, note, § 6(a) & (b):

(a) Federal Recognition.— Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible to receive all the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally

recognized Indians and Indian tribes.

(b) Application of Federal Law.— For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. §§ 1721 *et seq.*).

25 U.S.C. § 1721, note, § 7(a):

TRIBAL ORGANIZATION

(a) In General.— The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and amendments thereto.

30 MRSA § 6202 [The Maine State Implementing Act]:

Legislative findings and declaration of policy

The Legislature finds and declares the following:

....

...the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State of Maine.

30 MRSA § 6204:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the same extent as any other person or lands or other natural resources therein.

30 MRSA § 6206.1:

> **General Powers.**
>
> ...[I]nternal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

30 MRSA § 7203[The Micmac Settlement Act]:

> **Laws of the State to apply to Indian Lands**
> *Section added pending receipt of certification of agreement by Council of Aroostook Band of Micmacs.*
> Except as otherwise provided in this Act, the Aroostook Band of Micmacs and all members of the Aroostook Band of Micmacs in the State and any lands or other natural resources owned by them, held in trust for them by

the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 MRSA § 7205:

Powers of the Aroostook Band of Micmacs

Section added pending receipt of certification of agreement by Council of Aroostook Band of Micmacs.

The Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.